Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1994

RICHARD L. FISHELL
and
DOROTHY M. FISHELL

Petitioners

vs

ROBERT SOLTOW
and
ROSALEE SOLTOW
and
JOHN A. PORTER, Trustee

Respondents

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the bankruptcy court, in considering a contested Rule 9019 motion brought by a Chapter 7 Trustee, complies with the requirements set forth in Protective Committee for Stockholders of TMT Trailer Ferry v Anderson, 390 US 414 (1968) by approving the compromise of an adversary proceeding and a claims objections proceeding when the terms of that compromise produce a $2,000 payment to the estate in return for the estate's relinquishment of an opportunity to recover property valued at $1.38 million and where the court

a. neither requires nor receives testimonial or other evidentiary submissions of any kind;

b. neither allows, disallows or otherwise values the "Proof of claim" being resolved by the compromise;

c. neither discusses nor analyzes

the facts, the merits or the legal issues raised by that "Proof of Claim";

d. neither discusses nor analyzes the facts, the merits or the legal issues raised by the various counts of the complaint in the adversary proceeding being resolved by the compromise; and

e. renders approval of the compromise without setting forth any findings of fact or conclusions of law related to the merits of the "claim" or the causes of action stated in that adversary complaint.

2. Whether the panel decision results in the creation of a conflict between the law of the 6th Circuit and the law of the 7th and 9th Circuits, as well as that set forth by the United States Supreme Court.

3. Whether the panel decision in this case announces a departure from prior precedent concerning evidentiary standards

or burdens placed upon compromise proponents in compromise proceedings in bankruptcy court under Rule 9019 of the Bankruptcy Rules.

4. Whether the panel decision in this case announces a departure from prior precedent concerning the adequacy of the compromise hearing record which must be made before the bankruptcy court so that an appellate court may determine whether the bankruptcy court has rendered "an informed and independent judgment" on the propriety of a compromise which that court approves.

5. Whether the panel decision properly determined that the Debtors lacked standing to appeal an order of the bankruptcy court, rendered pursuant to Rule 9019, entered over the Debtors' objection, where no 6th Circuit authority is cited in support of the panel decision and the panel decision conflicts with the decision of the 1st Circuit, cited

by the panel as authority, and conflicts with 7th circuit authority more directly and factually relevant.

6. Whether Debtors in cases, such as this one, which are not "no-asset" cases may be denied standing to appeal an order, rendered pursuant to Rule 9019, entered over their objection where such order, both, forecloses the Debtors from possible recovery of property through an adversary proceeding and concurrently forecloses consideration of the Debtors objection, filed pursuant to Rule 3007, to a Proof of Claim filed against their bankruptcy estate.

STATEMENT PURSUANT TO RULE 14.1(b)

Richard L. Fishell and Dorothy M. Fishell are individual petitioners.

Robert Soltow and Rosalee Soltow are individual respondents.

John A. Porter is an individual respondent who is acting in the capacity of Chapter 7 Trustee of the petitioners' bankruptcy estate.

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OPINIONS BELOW

The 16 February 1995 decision of the United States Court of Appeals for the Sixth Circuit, Case No 94-1109, was not reported, however the opinion is reprinted in the Appendix to this petition at (A3). No opinion was rendered by the Court of Appeals in its denial of Petitioners' Petition for Rehearing and Suggestion for Rehearing In Banc. (A1)

The decision of the United States District Court, Western District of Michigan, Case No 1:92cv845, is also unreported, however the opinion is reprinted in the Appendix to this petition at (A19,21). The decision of the United States Bankruptcy Court, Western District of Michigan, Case No 90-85144 (Adv Pro # 91-8015),was also unreported, however those orders are reprinted in the Appendix to this petition at (A39,95,99,102).

JURISDICTION

The orders from which the petitioners appealed were entered on the 14th, 17th & 20th days of July 1992 (A95,99,102) by the United States Bankruptcy Court, Western District of Michigan. A Motion and Amended Motion for Rehearing thereof were filed by petitioners on the 21st day of July 1992 which were timely under Rule 9023, Fed R Bankr Pro. The Debtors' amended motion for rehearing was denied by the Bankruptcy Court on the 25th day of August 1992 (A39). Petitioners timely filed a notice of appeal to the United States District Court, Western District of Michigan, on the 3d day of September 1992. The District Court had jurisdiction pursuant to 28 USC 158(a); Rule 8002(b), Fed R Bankr Pro.

The United States District Court, Western District of Michigan, affirmed the bankruptcy court in its opinion and order of 7th December 1993. (A19,21) The petitioners timely

filed their notice of appeal to the United States Court of Appeals, Sixth Circuit, on the 5th day of January 1994. The United States Court of Appeals had jurisdiction pursuant to 28 USC 158(d). The decision of the District Court was affirmed by the United States Court of Appeals on the 16th day of February 1995. (A3). Petitioners timely filed a Petition for Rehearing and Suggestion for Rehearing In Banc on the 2d day of March 1995, pursuant to Rules 35 and 40, Fed R App Pro and 6th Circuit Rule 14. See (A233) The petition and suggestion were each denied by the Court of Appeals on the 6th day of April, 1995. (A1)

This Court has jurisdiction pursuant to 28 USC 1254(1).

STATUTES INVOLVED

Title 11, United States Code, Section 502(a) and (b) are reprinted at (A217).

Title 28, United States Code, Section 158(a) and (d) are reprinted at (A220).

Title 28, United States Code, Section 1254(1) is reprinted at (A221).

RULES INVOLVED

Rule 3007, Federal Rules of Bankruptcy Procedure is reprinted at (A222).

Rule 9019, Federal Rules of Bankruptcy Procedure is reprinted at (A222).

Rule 9023, Federal Rules of Bankruptcy Procedure is reprinted at (A222).

STATE STATUTES

MSA 27A.2701 et seq., is reprinted at (A223).

STATEMENT OF THE CASE

INTRODUCTION

Petitioners, Debtors in a Chapter 7 bankruptcy case, contested the compromise of an adversary proceeding by the bankruptcy court pursuant to Rule 9019(a), Fed R Bankr Pro. The compromise was made between the Chapter 7 Trustee and Robert Soltow, the Debtors' litigation opponent in an adversary proceeding.(A163, 169) The compromise also included resolution of a proof of claim filed by Soltow to which the Debtors had objected. The adversary proceeding was commenced in state court by the Debtors, prior to bankruptcy, and sought to recover title to 43 acres of real property. (A 184). Following the filing of Debtors Chapter 11 in 1990, the state suit was removed to bankruptcy court.

Soltow and others procured conversion of the case to Chapter 7 in January 1992. Shortly thereafter the Trustee replaced the

Debtors counsel in the adversary proceeding and Soltow filed a Proof of Claim against the estate alleging that the Debtors had slandered the title to the property in dispute when they filed a lis pendens in conjunction with the original filing of the state court suit.(A223) The Debtors filed an objection to this claim which was set for hearing on 22 July 1992. (A85) The trial of the adversary proceeding was set for August 1992. (A116) On 12 June 1992, however, the Trustee and Soltow "settled" the suit and Proof of Claim (A169) and submitted the same for court approval.(A 163) The Debtors objected. A hearing was held on 10 July 1992 and the court approved the compromise at that time, since immediate approval was required by Soltow. (A102,105) The Debtors' objection to Soltow's proof of claim was rendered moot.(A85) The court denied Debtors motion for rehearing of the approval of the compromise.(A39) Thereafter, the Debtors

pursued the appeal process.

The Debtors contended that the compromise was not reasonable; that the court had failed to comply with the substantive and procedural prerequisites to a valid approval under Rule 9019; and that the record could not support the propriety of the compromise under controlling case law. Soltow contended, among other things, that the Debtors lacked standing to appeal. The appellate courts addressed both issues, finding that the Debtors lacked standing to appeal and that, in any event, the bankruptcy court had not abused its discretion in approving the settlement. (A19,21)(A1,3)

FACT SUMMARY

The subject of the proposed compromise was a pending adversary proceeding brought by the Debtors against Soltows which sought cancellation of a deed from Fishells to Soltows. (A184)(A257) The adversary complaint alleged that the transfer to Soltow had involved issues of fraud, misrepresentation, lack of consideration, usury and the theory that Soltow had not acquired absolute title to the property but that the deed was, in equity, a mortgage. The property consisted of 43 acres of vacant but improved land and was valued at $1.3-$1.5 million, by the parties and an independent appraisal. At the time of the disputed transfer to Soltow in 1989, Soltow held an amended mortgage on the property of approximately $610,000. The original mortgage principal of $350,000 was modified in 1988 when various documents giving rise to the disputed transfer were prepared and executed. Usury infected (A257)

promissory notes underlying the mortgage. (A160) The Debtors action to set aside the deed was commenced in Michigan state court and removed to the bankruptcy court when the voluntary chapter 11 petition was filed in November 1990.

On the motion of Soltow, his attorneys and the US Trustee, the case was converted to Chapter 7, over the Debtors' objection, in January 1992. Shortly thereafter Soltow filed a Proof of Claim in the sum of $250,000 contending that the suit to recover title and the filing of a lis pendens in conjunction with that suit had slandered the title to the disputed property. Filing of the lis pendens was authorized by statute. MSA 27A.2701.

The Debtors' objection to Soltows' proof of claim was set for hearing on 22 July 1992. (A85) See Rule 3007, Fed R Bankr Pro. The adversary proceeding seeking recovery of the property was set for trial in August 1992. (A116). But, in June 1992, the Trustee and

Soltow entered into a Release and Settlement Agreement (A 163, 169) which provided for dismissal of both the adversary proceeding and the Soltow slander claim. Soltow expressly conditioned the agreement on its obtaining court approval on 10 July 1992, or prior to either the claims objection hearing or the trial of the adversary complaint. (A 105) The Trustee moved the court for approval of this compromise under Rule 9019 (A 163) and the lone hearing, lasting an hour, on the issue of settlement took place on 10 July 1992. See (A 105) The Trustee's unsworn motion did not contain or accompany any affidavit or other evidentiary material.(A 105, 163)

The 10 July 1992 approval hearing before the bankruptcy court involved the argument of counsel only. (A 105, 147) The Debtors were allowed 20 minutes in opposition to the settlement and Soltow and the Trustee, the proponents, were allowed 40 minutes. (A109)

The proponents submitted no witnesses or other evidence in any form. (A147) The proponents did not analyze the law that was to apply to the causes of action stated in the complaint. The proponents did not outline the evidence which they perceived might be offered at trial. The proponents did not submit proposed findings of fact or conclusions of law for the court to review or act upon. Counsel for the Trustee noted that the court was "relatively aware of the facts of the adversary proceeding" (A111). The proponents did not analyze the facts or the law relating to the Proof of Claim filed by Soltow.

The Debtors proposed that no settlement be approved until independent hearing of the Soltow Proof of Claim on 22 July, (A144) however this was opposed by Soltow and the Court declined to wait. The Debtors submitted a memorandum to the court on the slander of title issue, but the court dec-

lined to read it prior to ruling. (A144-145)

The arguments of the proponents were no more than arguments and were speculative in nature. Generalized assertions about possible future costs and possible future delays formed the bulk of the argument in support of the proposed settlement. There was virtually no discussion of the merits of the legal issues involved.

Immediately at the close of argument, the court entered upon its ruling. (A154-162) This recitation of the background of the case does not go beyond the meager description set forth in the Joint Release and Settlement Agreement executed between the Trustee and Soltow. (A163, 169) Other than the issue of usury, no other issue, claim or cause of action involved in the adversary proceeding was noted in the court's ruling. No mention was made of the slander claim raised in Soltow's Proof of claim. The entirety of the Debtors' complaint (A 184)

had focused on matters which would have vitiated the Fishell/Soltow agreement of 1988, yet the entirety of the recitation given by the proponents in their argument, and given by the court in its ruling, is limited to the abbreviated overview of the origin of the disputed transaction, rather than to any explanation of the legal issues raised by that complaint. (A 105, 163).

As a result of the approval of the settlement, Soltow's Proof of Claim (mischaracterized as a counterclaim) was dismissed and the Debtors' adversary complaint was also dismissed. (A95,99,102) Soltow paid $2,000 to the estate and, in return, the Trustee released, to Soltow, the estate's claim for recovery of the 43 acres of real property (and with it a potential equity for the estate and the Debtors of $500,000 to $900,000, or more). (A 163).

There is no indication, in the compromise proceedings, from either the court or

the proponents, as to how it was determined that this particular compromise (as opposed to one on alternative terms or as opposed to any compromise at all) was both fair and reasonable or "fair and equitable." The Debtors sought rehearing, which was denied[1], and thereafter commenced their appeal process.

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1. It is evident from the transcript of the hearing on Debtors' motion for rehearing (A42) that the trial judge did not perceive the requirements of Rule 9019 or of TMT. Counsel for Soltow did not assist in enlightening the court by offering that the settlement could have been approved "in chambers". (A59,60) Counsel for the Trustee, likewise, provided no guidance on the proper settlement standards (A62-65). The court was presented with relevant authorities on Rule 9019, (A54), which the court declined to review before ruling. At the conclusion of this argument, the court immediately entered upon its ruling, denying the motion and reiterating its prior recollections from the settlement hearing of 10 July.(A67-73) In addition, the court concluded that the Debtors' Rule 9023 motion and argument was a violation of Rule 9011 and imposed sanctions on Debtors' counsel. (A39,42, 73-84).

ARGUMENT

Rule 9019 Compliance

For there to be compliance with the TMT standard, far more was required of the court and the proponents than was shown by either in this case.[2] The decisions of the appellate courts (A3)(A 21) could not create or unearth a record which was not created in the bankruptcy court in the first instance, though each of the those courts attempted to do so.

The principal reason, it appears, for the rule of TMT, which requires that there be some record of the bankruptcy court's "evaluation of the facts and analysis of the law" is to provide some basis for appellate

2. The proponents bear the burden of persuasion on the issue of the compromise. In Re Hydronic Enterprises Inc., 58 BR 363 (Bankr D RI 1986); In Re A & C Properties 784 F 2d 1377 (9th Cir 1986). The Court has an independent duty to apprise itself of the facts and the law necessary to make an independent judgment about whether the settlement should be approved. In Re American Reserve Corporation, 841 F 2d 159 (7th Cir 1987).

review. In this case, the lower appellate courts were unable to analyze the specific facts or legal issues involved in the Soltow claim or in the Debtors adversary proceeding because the bankruptcy court did not set out what facts and issues it considered in reaching its conclusions. See (A154-162) The bankruptcy court did not even set out its conclusions as to the Proof of Claim or as to any of the causes of action in the complaint. The appellate courts could not say which factors were weighed by the bankruptcy court, or whether such factors were correctly weighed or analyzed because those specific factors, and the bankruptcy court's reasoning regarding them, are nowhere to be found.

TMT states that "without evaluation of the facts or analysis of the law" review is not possible because "an appellate court... must have a basis for judging the exercise of the trial court's discretion." Here,

there was no bankruptcy court evaluation of the facts or analysis of the law and for that reason, the District Court and the Court of Appeals did not have any basis for judging the exercise of the bankruptcy court's discretion. Those courts, which were required to examine the bankruptcy court decision under the "abuse of discretion" standard, had no predicate upon which to base a decision. In the absence of an outline of the factors which produced the decision of the bankruptcy court, no judgment about the bankruptcy court's exercise of discretion could possibly be made.

The appellate court decisions in this case are based largely on speculation about what the bankruptcy court "might" have considered or upon what the full reach of the court file "might" have contained. However, merely because the entirety of an available court file may have contained all the information necessary for a proper "evaluation"

or "analysis" is not enough. The decisions of the District Court and Court of Appeals, however, rest on little more than such speculation, given the inadequate record made at the settlement hearing. The TMT standard requires that the focus be upon what the trial judge actually considered, evaluated and analyzed, not upon what he might have had an opportunity to consider, evaluate and analyze.

The decision of the Sixth Circuit to uphold a decision which the bankruptcy court made, without compliance with the standards prescribed by TMT, constitutes a departure from the rule of TMT and a departure from the authorities noted in the Sixth Circuit opinion as well.

The decision of the court of appeals in this case finds no support among the circuits. Some circuits have explicitly required that stated or written findings of fact be made which can be supported by

an adequate record at the settlement proceeding. See In Re Walsh Construction. Inc., 669 F 2d 1325 (9th Cir 1982)(reversal required where no proper findings are made which are supported by an adequate record): Cotton v Hinton, 559 F 2d 1330 (5th Cir 1977); In Re Corrugated Container Anti Trust Litigation, 643 F 2d 195 (5th Cir 1981)(court reversed; finding that new findings and evidence were required); Plummer v Chemical Bank, 668 F 2d 654 (2d Cir 1982)(settlement must have evidentiary foundation and findings are necessary to permit review; and those findings and conclusions should not be based "simply on arguments and recommendations of counsel").

In short, unless a court's approval of a settlement is based upon

> "'well reasoned conclusions arrived at after a comprehensive consideration of all relevant factors' its decision will not survive appellate review. (citing TMT and others)."

Plummer v Chemical Bank, above, at 659. In Boston and Providence Railroad Corporation, 673 F 2d 11 (1st Cir 1982) the court said that a Trustee's petition and supporting affidavit which was conclusory in form was not adequate under the TMT standard and that reversal was required. That court noted, regarding the lower court ruling, at p. 13

> "even if the court was drawing on other information, beyond the petition and affidavit, its findings and order do not demonstrate an independent evaluation of that information ...the court must act independently, out of its own initiative, for the benefit of all creditors. This obligation prevails even where the creditors are silent. (citing TMT)"

The Trustee/Soltow motion suffers the same deficiencies. (A 163). Further, the bankruptcy court opinion (A 154-162) did not expand on the contents of that motion.

Matter of Jackson Brewing Company, 624 F 2d 605 (5th Cir 1980) sets forth a proper

description of the TMT standard, stating

> "the supreme court has explained that review on appeal must be grounded on clear support in the record, coupled with sound analysis..."

The approval of the Trustee/Soltow settlement in the present case fails both of these tests because, 1) there was no stated findings of fact, written or otherwise and no other evidentiary record was created at the settlement hearing (A 105-162) and 2) there was no analysis. pertinent to the issues being compromised, created at the settlement hearing.

In the case of Matter of AWECO, Inc., 725 F 2d 293 (5th Cir 1984), the court reversed approval of a settlement despite the fact that some evidentiary proceedings had taken place in the bankruptcy court. That court noted as follows at 299

> "...the First Circuit observed: [In approving compromises] 'the court must act independently, out of its own initiative, for the benefit of all

creditors. This obligation prevails even where creditors are silent'. (cites omitted) We agree. An approval of a compromise absent a sufficient factual foundation, inherently constitutes an abuse of discretion.

Given the nature of settlements and of this one in particular, it is not difficult to understand the dearth of information. United exerted pressure upon AWECO to gain approval of the settlement quickly...Time pressure apparently influenced the bankruptcy judge to deny the government's request for a continuance to develop evidence... In an analogous situation in Protective Committee v Anderson, 390 US at 450, 88 S Ct at 1176, the Supreme Court voiced its sympathy with the desire of a court to terminate protracted bankruptcy proceedings. However, the Court observed that, 'the need for expedition is not justification for abandoning proper standards.' Id...the circumstances below, surrounding approval of this settlement, called for a pause. Proof of value must find expression in definite numbers, not figures merely opined, mentioned or guessed. The bankruptcy judge should not reach for his stamp marked "approved" unless some party supplies concrete facts ...Furthermore, decisions as central to bankruptcy proceedings as approval of settlements can not be visceral. They must issue from reason

and rest upon factual underpinnings."

The Trustee/Soltow compromise scenario is quite similar to the one presented in AWECO.[3]

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3. Soltow announced at the 10 July 1992 hearing that approval was required that day. (A116) Final approval, achieved a mere one hour later, shielded Soltow's slander of title claim from scheduled scrutiny on 22 July (A86, 99) and prevented a trial on the merits of the complaint in August 1992 (A 116). The slander claim was not addressed by the court at the 10 July settlement hearing (A 105) nor at the hearing on the motion for rehearing (A42) and thus, the lack of merit in that claim was not openly revealed.

As noted court approval was achieved on argument of counsel alone. This was not sufficient. See Saylor v Lindsley, 456 F 2d 896 (2d Cir 1972); Pettway v American Cast Iron Pipe Company, 576 F 2d 1157 (5th Cir) cert den 439 US 1115, 99 S Ct 1020, 59 L Ed 2d 74 (1978). As noted by counsel for the Trustee (A111) the court was "relatively aware" of the facts of the adversary proceeding. No similar contention was made about the court's "awareness" regarding the Soltow proof of claim being compromised at the same time. Without consideration by the court of an issue of the signficance of the Proof of Claim, no overall determination of "fair and equitable" could have been made. See In Re Walsh Construction Inc., above, 669 F 2d at p. 1330-31 (finding of "fair and equitable" not possible where record is silent on a critical component of the compromise); In Re Woodson, 839 F 2d 610 (9th Cir 1988)(bankruptcy court may not, without reason, completely ignore non-frivolous objection).

Standing to Appeal

The District Court concluded that the Debtors lacked standing to appeal the bankruptcy court decision to approve the compromise.(A21) This conclusion was approved by the court of appeals.(A3)

The Debtors argued below that the standing issue was best analyzed with reference to the 7th Circuit case Matter of Andreucetti,975 F 2d 413 (7th Cir 1992). The Trustee/Soltow settlement forever barred the Debtors from achieving any recovery of the 43 acres (and with it the largest potential asset of their estate). Andreucetti found standing under circumstances substantially similar to those presented here, i.e. where the Debtors challenge a compromise which deprives them of an opportunity to emerge from bankruptcy with a surplus. At p 417, the Court stated

> "...(debtors) interest in gaining the possible surplus has been affected by the confirmation of the plan, and they possess a pecuniary interest that could be

> directly and adversely affected by the confirmation order. This alleged injury is sufficiently direct to allow for standing."

Other illustrations of similar analyses exist. In In Re International Environmental Dynamics Inc., 718 F 2d 322 (9th Cir 1983) a contestant seeking creditor status and payment from a fund accumulated by a debtor-in-possession was allowed standing to appeal an order awarding attorneys fees from that fund since

> "...in a case involving competing claims to a limited fund, a claimant has standing to appeal an order disposing of assets from which the claimant seeks to be paid. (claimant) satisfies this test for standing because it asserts a claim to funds that the bankruptcy court awarded to the (attorney)."

The same analysis applied in In Re Commercial Western Finance Corporation, 761 F 2d 1329 (9th Cir 1985) wherein an order confirming a plan involving elimination of investors' interests in notes and deeds of trust gave those investors standing to

appeal that confirmation order because

> "...The plan eliminated their interests in the borrower notes and deeds of trust and disposed of the assets in the estate from which they seek to be paid."

Similarly, in Kane v Johns-Manville Corporation, 843 F 2d 636, 642 (2d Cir 1988) the court noted that

> "as a general rule, creditors have standing to appeal orders of the bankruptcy court disposing of property of the estate because such orders directly affect the creditors ability to receive payment of their claims. (cites)"

In Kane, the creditor had standing to appeal confirmation of a Chapter 11 plan because

> "...a creditor has economic interests that are directly impaired by the Plan...Kane might receive more under this plan than he would receive in a liquidation. However, he might do better still under alternative plans. Since the Second Amended Plan gives Kane less than what he might have received, he is directly and adversely affected pecuniarily by it, and he therefore has standing to challenge it on appeal."

The same may be said of the Debtors in the present case. Had the bankruptcy court

properly analyzed the matters proposed for compromise, the one approved might have been rejected and given rise to a better one or none at all.[4] Because it was conceivable that the continuation of the adversary proceeding offered the possible return of value to the estate which far exceeded all filed claims, the Debtors had a pecuniary interest which was foreclosed by approval of the Trustee's settlement. See Andreucetti, above, and (A131-144)

Furthermore, under 11 USC 726(a)(6), the Debtors are entitled (as the lowest priority) to receive distribution from the Trustee upon completed liquidation, to the extent that assets are available. Debtors are, in

4. For this reason, Soltow's Proof of Claim was critical. Had the court determined the slander claim to be without merit or had the court valued that claim as contemplated under 11 USC 502 upon objection under Rule 3007, no estate assets may truly have been at risk in the litigation and, thus, no reason would have existed which would have prevented trial, or an abandonment of the action, to the Debtors, under 11 USC 554. The bankruptcy court simply never focused on the lis pendens/slander issue.

truth, creditors of their own estate, or claimants to a fund, just as other creditors are claimants to that fund. Only the "size" of the fund determines whether they shall receive distribution. therefore the size of that fund, particularly in circumstances such as those presented here, directly affects their "pecuniary interest". The Trustee/Soltow settlement forever terminated the adversary proceeding and with it the prospect of the Debtors recovery therefrom. The loss of an opportunity to recover an asset of the value or magnitude represented by the 43 acres clearly, and adversely. affected these Debtors and their creditors as well.[5] This would accord standing to the Debtors under any analysis above.

5. As to the Debtors. the compromise did "impair their rights" under the In Re El San Juan Hotel, 809 F 2d 151 (1st Cir 1987). standard. El San Juan is not otherwise controlling. The present case is not a "no asset" case (A241-242). Further. the litigant denied standing in El San Juan was not. by virtue of such denial, deprived of all means of protecting his interests in that case.

REASONS FOR GRANTING THE WRIT

This case involves a question of the procedure to be followed by a bankruptcy court in the consideration of a proposed compromise of litigation affecting the Debtors, creditors and the estate. This issue was deemed of sufficient significance to merit review in this Court in Protective Committee for Stockholders of TMT Trailer Ferry v Anderson, 390 US 414 (1968). This Court, in "TMT", set forth guidelines which must be followed by a lower court in rendering a decision to approve or disapprove settlements of litigation in bankruptcy court. For the reasons noted, the decision of the Court of Appeals below conflicts with the mandates of TMT. A conflict of this nature will merit the granting of the writ. See Supreme Court Rule 10(c).[6]

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6. The 6th Circuit decision here conflicts with the decision in Protective Committee for Stockholders of TMT Trailer Ferry v Anderson, above, because it approves a standard for compliance with Rule 9019 far less rigorous than imposed by TMT.

By virtue of the decision of the Court below, the Sixth Circuit is now in conflict with the 5th, 7th and 9th circuit courts of appeal in the interpretations given of the requirements of TMT. The decision of the Sixth Circuit approves bankruptcy court approval of proposed compromises where bankruptcy court consideration is limited to the argument of counsel. No evidentiary submissions, no findings of fact or other evidence of bankruptcy court review or analysis of the litigation issues appears to be required by the sixth circuit. No other circuit court of appeal has authorized such an informal procedure. As such, the decision of the 6th Circuit conflicts with the 7th and 9th circuits.[7]

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7. See Supreme Court Rule 10.1(a)(Circuit court conflict proper basis for certiorari); United States v Embassy Restaurant Inc, 359 US 29, 79 S Ct 554, 3 L Ed 2d 601 (1959); Mitchell v Robert DeMario Jewelry Inc., 361 US 288, 80 S Ct 332, 4 L Ed 2d 323 (1960); Katchen v Landy, 382 US 323, 86 S Ct 467, 15 L Ed 2d 391 (1966); Segal v Rochelle, 382 US 375, 86 S Ct 511, 15 L Ed 2d 428 (1966).

such a procedure provides no means for a reviewing court to assess the propriety of a settlement when approved in such a manner, as there exists no means by which to judge whether such a settlement meets the standard of "fair and equitable". Therefore the 6th Circuit decision, here, directly limits or contravenes a basic standard or purpose of TMT. A question of the proper application of a Supreme Court precedent presents a valid basis for granting the writ. Supreme Court Rule 10.1(c).

Also by virtue of the decision of the Court below, the Sixth Circuit in now in conflict with the 1st and 7th Circuit courts of appeal on the issue of whether Debtors, in "asset", as opposed to "no-asset" cases, have standing to appeal a decision of the bankruptcy court which affects their bankruptcy estate and which forecloses the Debtors from an opportunity to emerge from bankruptcy with a surplus.

Debtors were denied standing to appeal a decision of the Trustee which resulted in the dismissal of an adversary proceeding initiated by them to recover, potentially, the largest asset of their estate. The Debtors were also denied their right to secure a determination of the validity or "value" of a claim filed against their estate, as that claim was disposed of as a part of the Trustee's compromise of the adversary proceeding.[8] Thus, standing to appeal was denied which would have otherwise been accorded under Rule 3007.[9]

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8. Mulligan v Sobiech, 131 BR 917 (DC SD NY 1991); In Re Chateaugay Corporation, 64 BR 990 (DC SD NY 1986).

9. Supreme Court Rule 10.1(c) provides an additional applicable ground for the granting of the writ in this case, i.e the significance of the federal question involved. Subpart (c) provides, in part,

> "(c) When a ...United States Court of Appeals has decided an import' ant question of federal law which has not been, but should be, set- tled by this Court, or has decided a federal question in a way that conflicts with applicable decision of this Court."

Each of these issues are significant in the administration of the bankruptcy laws. This also is a valid basis for granting of the writ.[10] The "standing" question, as described in Andreucetti, in El San Juan Hotel and in the present case, indicates a lack of congruence among the circuits on a significant bankruptcy issue, given the special or peculiar relationships which exist among Trustees, debtors, creditors and litigants in both adversary proceedings and in claims objection proceedings. Thus, the standing issues, presented by this case, have not yet been resolved by this court. The writ should be granted under either Rule 10.1(a) or under either of the grounds set forth in Rule 10.1(c).

This case commenced as a voluntary Chapter 11 but was converted to Chapter 7 over the Debtors' strenuous objections. The limitations or restrictions placed

10. See Segal and Katchen, above.

upon the rights of Chapter 7 Debtors by virtue of the powers and duties of the Chapter 7 Trustee, with the resulting limitations on Debtor "standing", offer the prospect of the imposition of onerous burdens on both Debtors and their creditors. The standards by which estates are administered and the extent of the rights retained by a Debtor in a Chapter 7 liquidation, which that debtor does not voluntarily seek, should be the subject of definitive guidelines. Those guidelines are not supplied or clarified by the 6th Circuit decision in this case.

In the absence of a firm, concise and identifiable foundation, created by the bankruptcy court, upon which to construct their review, as was envisioned by, and required in, TMT and the circuit examples noted, the lower courts, in the present case, were forced to work "backwards". The lower courts were forced to canvass, or attempt to canvass, the

extent of the court file and determine the extent to which all that preceded the settlement hearing "might" have factored into the ultimate decision of the bankruptcy judge. Such an approach stands "TMT" on its head.

The lower courts in the present case quite obviously were left to speculate about the propriety of the bankruptcy court decision because the bankruptcy judge did not describe in any concrete terms what weighed in his decision or what motivated him to conclude that the settlement proposed was an appropriate one. Indeed, a review of the transcripts of the settlement hearing (A105) and the hearing on the motion for rehearing (A42) raises serious doubts about the matters considered and about how those matters were resolved. The approval of such an apparently loose or informal compromise methodology by the 6th Circuit opinion places that circuit at odds with each of the others noted above, and with "TMT", as well.

In the absence of predictable and identifiable procedures and standards for the generation and review of Rule 9019 compromises, bankruptcy debtors, and their creditors, each of whom, in bankruptcy, retain a diminished control over their affairs, could easily fall victim to the most powerful or the most persistent of creditors or litigants, whose only obstacle would be that of the "neutral" Trustee, whose primary duty tends toward settlement or compromise. The Trustee's duties and objectives make him no match for the persistent individual litigant and therefore the Trustee's conclusions and recommendations about the merits of a controversy, or the wisdom of its proposed resolution, are not determinative under the Rule. For that reason, the fully informed and independent judgment of the bankruptcy judge is required to assure that a compromise is "fair" or "reasonable".

Unless that bankuptcy judge identifies, in concrete terms, those matters which he considered and why those matters led to the conclusion he reached, no review would ever be possible.

The present case is not a "no-asset" case.[11] It is also not a case where these Debtors purposely selected Chapter 7 liquidation. The settlement or compromise at issue here involved potentially the largest asset of the estate. These Debtors had more rights than were accorded them in the lower courts on the issues involved here and the bankruptcy court had more duties under the code and case law than it performed. The Rule 9019 standard approved by the 6th Circuit in this case does not accord with TMT or the circuits noted.

TMT states that "without evaluation of

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11. The Debtors assets exceeded liabilities at the outset of the case, (A241-242) and the magnitude of the claim compromised clearly supported their "standing" arguments.

the facts or analysis of the law" review is not possible because "an appellate court... must have a basis for judging the exercise of the trial court's discretion."[12] In the present case we have neither and the court of appeals has, in its decision, effectively dispensed, hereafter, with that TMT standard by failing to require the bankruptcy court to observe its requirements.[13]

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12. See also Matter of AWECO, above at p. 299, "An approval of a compromise, absent a sufficient factual foundation, inherently constitutes an abuse of discretion."

13. Only the 8th Circuit, in In Re Flight Transportation Corporation Securities Litigation, 730 F 2d 1128 (8th Cir 1984), gives any arguable indication that some "lesser" standard might be acceptable, however, it is unclear what limits that court might permit because that decision also reversed, in part, because of inadequate findings on certain of the issues compromised.

CONCLUSION

The decision of the court of appeals conflicts with this Court's decision in TMT Trailer Ferry and with decisions of those circuit courts noted above. The decision of the Sixth Circuit Court of Appeals in this case must be reversed.

Respectfully submitted

Lester N. Turner
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(616) 526-9222
Attorney for Petitioners

(2)

95 30 JUL 3 1995

OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1994

RICHARD L. FISHELL
and
DOROTHY M. FISHELL

Petitioners

vs

ROBERT SOLTOW
and
ROSALEE SOLTOW
and
JOHN A. PORTER, Trustee

Respondents

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

APPENDIX VOLUME I

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169pp

No 94-1109

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ORDER FILED

Apr 06 1995

IN RE: Leonard Green, Clerk

Richard L. Fishell and

Dorothy M. Fishell

Debtors

Richard L. Fishell and

Dorothy M. Fishell

Plaintiffs-Appellants

v

Robert Soltow and

Rosalee Soltow

Defendants-Appellees

John A. Porter, Trustee

BEFORE: ENGEL, KENNEDY and

SUHRHEINRICH, Circuit Judges

The court having received a petition for

rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

_____/s/_____
Leonard Green, Clerk pe

BEST AVAIL

No 94-1109

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Filed

Feb 16 1995

Leonard Green, Clerk

IN RE FISHELL

Debtors

Richard L Fishell and

Dorothy M Fishell

Plaintiffs-Appellants

v

Robert Soltow and

Rosalee Soltow

Defendants-Appellees

On Appeal from the United States District Court for the Western District of Michigan

/

Not Recommended for Full Text Publication Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must

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be served on other parties and the Court. This notice is to be prominently displayed if this decision is reproduced.

BEFORE: ENGEL, KENNEDY AND SUHRHEINRICH, Circuit Judges

PER CURIAM. Over objection of the debtors, the Bankruptcy Court approved a compromise that settled an adversary proceeding between debtors and their primary creditors, the Soltows. The debtors appealed to the District Court, arguing that the bankruptcy court abused its discretion in approving the compromise. The District Court first ruled that debtors lacked standing to appeal, but then proceeded to reach the merits of the appeal and affirmed the Bankruptcy Court, holding that the court had "apprised itself of the action's underlying facts and made an independent judgment as to whether the settlement was fair and equitable". (Dist.

Ct. Op. at 10). The Debtors now appeal to this court. We affirm.

I

This case traces its roots back to 1986, when Soltows loaned several hundred thousand dollars to the Fishells. The Fishells used the money to purchase a certain parcel of real estate and gave the Soltows a promissory note and mortgage on the property. In 1988, after Fishells defaulted on the loan, the Fishells and the Soltows entered into an amended agreement. As part of this agreement, the Fishells executed a new promissory note, which covered the original amount of the 1986 loan, as well as other interim, unsecured loans made by the Soltows to the Fishells. In return, the Soltows agreed not to start foreclosure proceedings and extended the time for repayment of the loan.

As part of the 1988 agreement, the Fishells also executed a warranty deed con-

veying the property to the Soltows. This deed was placed in escrow. According to the escrow agreement, if the Fishells defaulted again, the escrow agent was to release the deed to the Soltows, who would accept it as payment in full on the loan. If the Fishells did pay the loan in a timely manner, the escrow agent was to return the deed to them.

The Fishells did indeed default, and the escrow agent released the deed to the Soltows in March 1989. The Soltows then recorded the deed. In April 1989, however, the Fishells filed suit against the Soltows in Michigan state court, raising claims of fraud, usury, and equitable mortgage, and seeking to invalidate the warranty deed. In conjunction with the suit, the Fishells filed a notice of lis pendens. The Soltows responded to the suit and the filing of the notice by bringing a counterclaim for slander of title.

After the state suit had been pending for more than a year, the Fishells filed a Chapter 11 bankruptcy petition and removed the adversary proceeding to the Bankruptcy Court. After the bankruptcy proceeding had been pending for just over a year, the United States Trustee and several creditors moved to have the petition converted to a Chapter 7 proceeding. The Bankruptcy Court granted the motion, in part because it felt that it could no longer trust Mr Fishell to comply with the law. The court then appointed a trustee to oversee the estate.

After investigating the adversary proceeding between Fishells and Soltows, the trustee negotiated a settlement of that litigation. The terms of the compromise provided that both the Fishells and the Soltows would dismiss their claims against each other and that the court would cancel the notice of lis pendens. The settlement also required the Soltows to pay $2000

into the estate. In return, the Soltows would keep the property as satisfaction for the loan they made to Fishells. The trustee felt this was the most expedient and fair means of resolving the dispute and would enable him to satisfy the claims of the primary prepetition creditors, while still reserving sufficient funds in the estate to make substantial payments to the other creditors.

On June 12, 1992, the trustee filed a motion with the Bankruptcy Court asking it to approve the compromise. The Fishells objected to the compromise, but none of the creditors objected. On July 10, 1992, the Bankruptcy Court conducted a hearing on the trustee's motion and issued an opinion from the bench approving the settlement. The Fishells appealed the decision to the District Court, which concluded that the Fishells did not have standing to appeal and, even if they had standing, the

Bankruptcy Court had not abused its discretion in approving the settlement. The Fishells now appeal to this court.

II

A. Standing

Bankruptcy litigation, unlike other proceedings, has a special doctrine of appellate standing. Not all parties who are entitled to notice in the bankruptcy court are entitled to appeal the rulings of that court. In general, only parties to an adversary proceeding may appeal an order settling that litigation. Courts have, however, also created an exception allowing other 'aggrieved' parties to appeal. In Re El San Juan Hotel, 809 F 2d 151, 154 (1st Cir 1987). For purposes of the current appeal, the debtors are an aggrieved party only if they can show that a successful appeal would result in an estate whose assets exceeded its liabilities. Id. at 155 n 6.

In ruling on this issue, the District Court stated:

> The debtors contend that if the trustee had prevailed in the adversary proceeding and had successfully defended the counterclaim, the litigation would have created as estate with assets in excess of liabilities. The Debtors provide proof of the property's value and of Robert Soltow's claim. However, they provide no further information regarding the estate's other assets and liabilities, the cost of litigation, or other factors regarding the litigation's impact on the estate. The court finds that the debtors have not demonstrated that success in the adversary proceeding would have created an estate with assets in excess of liabilities. Accordingly, because the debtors have not shown that they are persons aggrieved by the bankruptcy court's order, the debtors lack standing to appeal.

(Dist Ct Op at 5).

The record filed with this court on appeal does not contain everything that was presented to the District Court. Based on information available to us, we are unable to say that the District Court erred in resolving the standing issue against the

Fishells. Even if that decision was erroneous, however, it is clear that the Fishells can not succeed on the merits of their appeal.

B. Approval of Compromise

The Federal Rules of Bankruptcy Procedure provide that

> [o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.

Fed. R. Bankr. P. 9019. "The purpose of a compromise agreement is to allow the trustee and creditors to avoid the expenses and burdens associated with litigating sharply contested and dubious claims...The law favors compromise and not litigation for its own sake,... and as long as the bankruptcy court has amply considered the various factors that determined the reasonableness of the compromise, the court's decision

must be affirmed." In Re A & C Properties, 784 F 2d 1377, 1380-81 (9th Cir)(citations omitted), cert denied, 479 US 854 (1986). We review a bankruptcy court's approval of a compromise under the abuse of discretion standard. Id. at 1380.

The Supreme Court has declared that

> [t]here can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. Further, the judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of the litigation.

Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v Anderson, 390 US 414, 424-25 (1968). "A bankruptcy judge need not hold a mini-trial or

write an extensive opinion every time he approves or disapproves a settlement. The judge need only apprise himself of the relevant facts and law so that he can make an informed and intelligent decision, and set out the reasons for that decision. The judge may make either written or oral findings; form is not important, so long as the findings show the reviewing court that the judge properly exercised his discretion." In Re American Corporation, 841 F 2d 159, 163 (7th Cir 1987).

When evaluating the fairness and equity of a proposed compromise, the court should consider:

> (a)The probability of success in the litigation;(b)the difficulties, if any, to be encountered in the manner of collection;(c)the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it;(d)the paramount interest of the creditors and a proper deference to their reasonable views in the premises.

In Re A & C Properties, 784 F 2d at 1381 (quoting In Re Flight Transportaion Corp.

Securities Litigation, 730 F 2d 1128, 1135 (8th Cir 1984), cert denied, 469 US 1207 (1985)). Although it is preferable that these matters be addressed in the Bankruptcy Court's opinion, "[i]f, indeed, the record contains adequate facts to support the decision of the trial court to approve the proposed compromises, a reviewing court would be properly reluctant to attack that action solely because the court failed adequately to set forth its reasons or the evidence on which they were based." Id. at 437.

While the bankruptcy court's opinion is not quite as specific on some of these issues as we would like, the record before the court clearly supports the approval of the compromise. The Bankruptcy Court had before it the record developed in the state court proceeding, as well as the extensive record developed before the bankruptcy court itself. The Bankruptcy Court held several hearings and decided several

motions related to the instant proceeding. These included motions for summary judgment and a formal Rule 2004 examination of Richard Fishell. Accordingly, the Bankruptcy Court possessed a good deal of information and knowledge about the dispute between the Fishells and the Soltows and how that dispute affected the Fishells' other creditors.

An examination of the relevant factors supports the Bankruptcy Court's decision to approve the compromise. The first factor directs the court's attention to the merits of the adversary proceeding. In this case, there is not great merit to either Fishells' or Soltows'claims. The Fishells brought fraud, equitable mortgage and usury claims against the Soltows arising out of the 1988 amended agreement. The fraud and equitable mortgage claims were highly doubtful, especially in view of Mr Fishell's extensive experience in the real estate business.

That leaves only the usury claims, which, while containing merit, were not for substantial sums of money, probably not what it would cost to litigate those claims. The Soltows' slander of title claim is likewise not very strong, although it might contain sufficient merit to make it costly to litigate. See e.g. Patten Corp. v Canadian Lakes Dev. Corp., 788 F Supp 975 (WD Mich 1991); Kauffman v Shifman, 426 NW 2d 819 (Mich Ct App 1988); Sullivan v Thomas Organization, 276 NW 2d 522 (Mich Ct App 1979). Thus, contrary to Fishells' assertions, the positions of both parties lacked substantial merit, and the estate did not have a strong likelihood of winning much money.

The fact-intensive nature of the dispute also means that any litigation would be time consuming and expensive. Even if the Fishells were completely victorious and succeeded in revoking the deed, the estate would still owe the Soltows more than half

a million dollars. The Soltows had taken the deed in lieu of foreclosing on the land. Should the deed be invalidated, the Soltows would still have the equivalent of a mortgage securing their loans to the Fishells. In addition, the Bankruptcy Court explicitly found, the Fishells had established a pattern of delaying legal proceedings, which would only add to the estate's expenses. The settlement allowed the Soltows to keep the deed, required them to pay $2000 to the estate, and left sufficient money in the estate to make substantial payments to the Fishells other creditors. These factors support the conclusion that the compromise was the most efficient and economical way of resolving the suit between the Fishells and the Soltows.

The Fishells' primary argument on appeal is that the Bankruptcy Court did not conduct an evidentiary hearing and did not explicitly inquire into many of the factual

issues underlying the adversary proceeding. The court, however, is not requied to go into the detail urged by the Fishells. The result of any such requirement would be virtually indistinguishable from a trial, which is the very thing the compromise was designed to avoid. The record before the Bankruptcy Court was sufficient to conclude that those factual matters would be time consuming to resolve and that, regardless of the resolution, the litigation expenses would drain more from the estate than was likely to be recovered. Accordingly, the Bankruptcy Court did not abuse its discretion in approving the compromise, and the District Court was correct to affirm that approval.

III

For the foregoing reasons, we AFFIRM the judgment of the District Court.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

IN RE

RICHARD L. FISHELL and
DOROTHY M. FISHELL

Debtors

Bankruptcy Court
File No NG 90-85144

Adv Pro No 91-8015

---/

RICHARD L. FISHELL and
DOROTHY M. FISHELL

Plaintiff/Appellants

File No 1:92-CV-845

Hon Benjamin F. Gibson

v.

ROBERT SOLTOW and
ROSALEE SOLTOW

Defendants/Appellees

ORDER

---/

At a session of the Court held in and for said District and Division in the City of Grand Rapids, Michigan, this 7th day of December 1993.

PRESENT: HON BENJAMIN F. GIBSON,
U. S. DISTRICT JUDGE

In accordance withthe Opinion dated

December 7, 1993, IT IS HEREBY ORDERED that the United States Bankruptcy Court's July 14, 1992, Order Granting Trustee's Motion to Approve Settlement is AFFIRMED.

IT IS FURTHER ORDERED that the following orders of the United States Bankruptcy Court, entered in pursuance of the July 14, 1992 Order Granting Trustee's Motion to Approve Settlement, are AFFIRMED: Stipulation and Order of Dismissal of Counter-Claim entered July 17, 1992; and Stipulation and Order of Dismissal and Cancellation of Lis Pendens entered July 20, 1992.

IT IS FURTHER ORDERED that the debtors' appeal (filed on September 3, 1992) is DISMISSED.

IT IS SO ORDERED

/s/
BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

IN RE

RICHARD L. FISHELL and
DOROTHY M. FISHELL

Debtors

Bankruptcy Court
File No NG 90-85144
Adv Pro No 91-8015

RICHARD L. FISHELL and
DOROTHY M. FISHELL

Plaintiff/Appellants

v.

ROBERT SOLTOW and
ROSALEE SOLTOW

Defendants/Appellees

File No 1:92-CV-845

Hon Benjamin F. Gibson

OPINION

This case involves an appeal from an order of the United States Bankruptcy Court for the Western District of Michigan approving a settlement of an adversary proceeding in appellants' Chapter

7 case. At issue is whether the bankruptcy court abused its discretion in approving the settlement. For the reasons stated below, the bankruptcy court's decision is affirmed.

I

In July 1986, Debtors Richard L. Fishell and Dorothy M. Fishell ("the debtors") and Robert Soltow entered into a promissory note and a mortgage. Soltow loaned the debtors $350,000.00 at 15% interest per year, with semi-annual payments due beginning January 7, 1987, and the principal and all accrued interest due on July 7, 1989. The obligation was secured by a mortgage on a parcel of real property in Oneida Township, Eaton County, Michigan ("the property").

The debtors did not pay any amounts to Soltow under the promissory note. In early 1988, Soltow notified

the debtors that the loan was in default and that he would commence foreclosure proceedings if they did not fully repay the loan. In resolution, on August 25, 1988, the debtors and Soltow entered into an amended promissory note, a mortgage modification agreement, and an escrow holding agreement. The amended promissory note had a principal sum of $610,446.14 and included additional monies Soltow had loaned to the debtors. Accordingly, the amended mortgage secured indebtedness of $610,446.14.

Under the amended promissory note, the debtors had until February 15, 1989, to make full payment. The escrow holding agreement provided that Soltow would place a mortgage discharge in escrow and that the debtors would place an executed warranty deed in escrow. If the debtors did not pay the indebtedness by February 15, 1989, the escrow agent was required

to release the two documents to Soltow. Soltow would be entitled to destroy the mortgage discharge and record the warranty deed. Conversely, if by February 15, 1989, the debtors paid the full amount owed, the escrow agent was required to release the documents to them. The debtors then would be entitled to destroy the warranty deed and record the mortgage discharge.

The debtors did not make any payments to Soltow. Therefore, pursuant to the escrow holding agreement, the escrow agent delivered the warranty deed and mortgage discharge to Soltow. On March 16, 1989, Soltow recorded the warranty deed in the Eaton County Register of Deeds.

In response, the debtors filed this action against Robert Soltow and Rosalee Soltow in the Circuit Court for the County of Eaton, Michigan. The debtors

sought to cancel the warranty deed. The debtors alleged fraud, misrepresentation, lack of consideration, that the deed was in reality a mortgage, and that the interest on the loans was usurious. The debtors further filed a notice of lis pendens with respect to the property. The Soltows filed a counterclaim, alleging that the lis pendens had slandered title to the property.

On November 16, 1990, the debtors filed a voluntary petition for bankruptcy under Chapter 11 of the Bankruptcy Code. Thereafter, the debtors removed this action to the bankruptcy court. On January 13, 1992, following a hearing on motions filed by the United States Trustee and Robert Soltow 1, the bankruptcy court entered an order converting the debtors' case from a Chapter 11 proceeding to a Chapter 7 liqui-

1. Creditor Patricia Andre filed a brief in support of the trustee's and Robert Soltow's motions.

dation. The debtors appealed and this Court affirmed the bankruptcy court's decision.

The Chapter 7 Trustee hired an attorney to investigate and evaluate the parties' claims in this action. After analysing the claims and after conducting a hearing of debtor Richard Fishell pursuant to Federal Rule of Bankruptcy Procedure 2004, the Trustee filed a motion to approve settlement pursuant to Federal Rule of Bankruptcy Procedure 9019. The debtors presented the only opposition to the proposed settlement. After a hearing on July 10, 1992, the bankruptcy court approved the settlement. The bankruptcy court denied the debtors' amended motion for rehearing and/or reconsideration. This appeal followed.

II

Appellees argue that the debtors

lack standing to appeal the bankruptcy court's order approving the settlement. In In Re Revco DS, Inc., 898 F 2d 498, 499 (6th Cir 1990), the sixth circuit held that in bankruptcy, appellate standing is limited to "persons aggrieved" by the bankruptcy court's actions.2 "Persons aggrieved" are "persons with a financial stake in the bankruptcy court's order." Id. (citations omitted).

The general rule is that the debtor is not a person aggrieved. In Re MCI, Inc. 151 BR 103, 106 (ED Mich 1992). However,

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2. The Sixth Circuit further held that the "pecuniary interest" test is not the only test for appellate standing. In addition, "[t]he Supreme Court has held that a public interest may also give a sufficient stake in the outcome of a bankruptcy case to confer appellate standing." In Re Revco DS Inc., 898 F 2d at 499 (citations omitted). However, the debtors do not contend that they have appellate standing based upon the "public interest" test.

under the following two situations a debtor has standing to appeal a bankruptcy court's order:

> (1)[I]f a successful appeal by the debtor would create an estate that has assets in excess of liabiliities; or (2) an appeal taken from orders that affect the terms, conditions and extent of a debtor's discharge.

Id. (citations omitted).

The debtors contend that if the trustee had prevailed in the adversary proceeding and had successfully defended the counterclaim, the litigation would have created an estate with assets in excess of liabilities. The debtors provide proof of the property's value and of Robert Soltow's claim. However, the provide no further information regarding the estate's other assets and liabilities, the costs of litigation, or other factors regarding the litigation's impact on the estate. The Court finds that the debtors have not demonstrated that success in the adversary

proceeding would have created an estate with assets in excess of liabilities. Accordingly, because the debtors have not shown that they are persons aggrieved by the bankruptcy court's order, the debtors lack appellate standing.

III

Even if the debtors were persons aggrieved by the bankruptcy court's order, this court finds that the bankruptcy court did not abuse its discretion in approving the settlement. Federal Rule of Bankruptcy Procedure 9019(a) provides:

> On motion by the trustee and after a hearing on notice to creditors, the United States Trustee, the debtor and indenture trustees as provided in Rule 2002 and to such other entities as the court may designate, the court may approve a compromise or settlement.

Thus, the bankruptcy court must review all settlements to determine whether they are fair and equitable:

In bankruptcy proceedings, as dis-

> tinguished from ordinary civil cases, any compromise between the debtor and his creditors must be approved by the court as fair and equitable. Protective Committee for Independent Stockholders of TMT Trailer Ferry v Anderson, 390 US 414, 424, 88 S Ct 1157, 1163, 20 L Ed 2d 1 (1968); In Re A & C Properties, 784 F 2d 1377, 1381 (9th Cir) cert denied 479 US 854, 107 S Ct 189, 93 L Ed 2d 122 (1986). In considering a proposed compromise, the bankruptcy court is charged with an affirmative obligation to apprise itself of the underlying facts and to make an independent judgment as to whether the compromise is fair and equitable. In Re American Reserve Corp. 841 F 2d 159, 162-63 (7th Cir 1987). The court is not permitted to act as a mere rubber stamp or to rely on the trustee's word that the compromise is "reasonable". Id. at 162.

Reynolds v Commissioner, 861 F 2d 469, 473 (6th Cir 1988); see also Bauer v Commerce Union Bank, 859 F 2d 438, 441 (6th Cir 1988) cert denied 489 US 1079 (1989).

This court reviews the bankruptcy court's decision to approve the settlement for an abuse of discretion. In Re A & C Properties, 784 F 2d at 1380; In Re American Reserve Corp., 841 F 2d at 162. As the moving party,

the trustee bears the burden of persuading the bankruptcy court that the settlement is fair and equitable and that the court should approve the settlement. In Re A & C Properties, 784 F 2d at 1381. In analyzing a settlement, "the court is obligated to weigh all conflicting interests in deciding whether the compromise is "fair and equitable", considering such factors as the probability of success on the merits, the complexity and expense of litigation, and the reasonable views of creditors." Bauer, 859 F 2d at 441 (citing In Re American Reserve Corp., 841 F 2d at 161). When examining a proposed settlement, "[t]he bankruptcy judge may give weight to the opinions of the trustee, the parties, and their attorneys." In Re A & C Properties, 784 F 2d at 1384 (citation omitted).

In essence, the bankruptcy court must make an independent judgment that a proposed settlement is fair and equitable:

> As we have recognized in other contexts the abuse of discretion standard recognizes that because of the bankruptcy judge's unique position, second-guessing by appellate courts will do little to improve upon bankruptcy judge's decisions.
> ...
> In exercising his discretion, the bankruptcy judge must also give the reviewing court "some basis for distinguishing between well-reasoned conclusions arrived at after comprehensive consideration of all relevant factors, and mere boilerplate approval...unsupported by evaluation of the facts or analysis of the law". TMT Trailer Ferry, 390 US at 434, 88 S Ct at 1168. In other words, the bankruptcy judge must make findings and explain his reasoning sufficiently to show that he examined the proper factors and made an informed and independent judgment.

In Re American Reserve Corp., 841 F 2d at 162 (citations omitted). However, the bankruptcy court is not required to hold a mini-trial or write an extensive opinion:

> The judge need only apprise himself of the relevant facts and law so that he can make an informed and intelligent decision, and set out the reasons for his decision. The judge may make either written or oral findings; form is not important, so long as the findings show the reviewing court that the judge

properly exercised his discretion. In Re American Reserve Corp., 841 F 2d at 163. Therefore, "as long as the bankruptcy court amply considered the various factors that determined the reasonableness of the compromise, the court's decision must be affirmed. In Re A & C Properties, 784 F 2d at 1381 (citation omitted).

At the July 10, 1992, hearing on the trustee's motion to approve settlement, the trustee's attorney and the Soltows' counsel presented arguments in favor of the settlement. No creditor opposed the proposed settlement. The debtors made the only objections to the motion. The debtors did not introduce evidence or testimony in opposition to the settlement.

The bankruptcy court stated that it had read all briefs that were timely filed. The bankruptcy court further specifically stated that the court had read the debtors' brief in opposition to the settlement.

During the debtors' presentation at the hearing, the debtors filed an additional brief with the court. The debtors' attorney acknowledged that the court would not have time to read the brief during the hearing and he stated that therefore he had argued the brief's contents. Additionally, the release and settlement agreement attached to the trustee's motion to approve settlement contained a summary of underlying facts and procedural history along with the factors upon which the settlement was based.

After hearing arguments by attorneys for the trustee, the Soltows, and the debtors, the bankruptcy court reviewed the underlying facts of the action and its procedural history. The court found that the adversary proceeding had a long history of delays and that if the action were not settled, more delays would follow. The bankruptcy court further found

that the debtors had repeatedly delayed the action and stated that in the court's opinion the debtors did not want the action to come to trial.

The bankruptcy court next commented upon the merits of the claim and stated that the debtors may have had a claim for usurious interest. The bankruptcy court was familiar with the parties' legal theories. At the July 10, 1992, hearing, the debtors' attorney acknowledged that the court had held numerous hearings in this action, including a hearing on the Soltows' and the debtors' motions for summary judgment. The debtors' attorney further stated that both parties had filed "substantial" motions for summary judgment. This Court notes that the parties had extensively briefed the motions and their respective opposition. The court finds that the bankruptcy court's comments during the July 10, 1992 hearing demonstrated

that it was well versed in the law underlying the adversary proceeding.

The bankruptcy court further noted that no creditor had objected to the proposed settlement. The court noted that the debtors had presented the only objection. The bankruptcy court stated that in the court's opinion the debtors wanted to create further expense, which the trustee was trying to avoid. The bankruptcy court stated that, generally, courts encourage settlements and that parties usually are better able that the court to settle actions on a reasonable basis. Based upon its findings and analysis, the bankruptcy court approved the proposed settlement.3

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3. Further, at the August 21, 1992, hearing regarding the debtors' motion for rehearing of the order approving settlement, the bankruptcy judge again discussed the underlying facts and procedural history. The bankruptcy judge again stated that the debtors had repeatedly delayed the action. The bankruptcy court noted that the debtors

IV

Based upon review of the record in this action, the Court finds that the bankruptcy court fulfilled its affirmative obligation to apprise itself of the action's underlying facts and to make an independent judgment as to whether the proposed settlement was fair and equitable. The Court further finds that bankruptcy court's opinion demonstrates that the court amply considered the various factors that determined the reasonableness of the proposed settlement. Therefore, the bankruptcy court did not abuse its discretion in approving the settlement. Accordingly,

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3.(cont.)
presented the only opposition to the settlement and that no basis existed for their objections. The bankruptcy court concluded that "the Court felt ... that the settlement was reasonable and the court approved of the settlement." Accordingly, the bankruptcy court denied the debtors' motion for rehearing.

the bankruptcy court's July 14, 1992, Order Granting Trustee's Motion to Approve Settlement is affirmed.

__/s/_____
BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

Dated: December 7, 1993

UNITED STATES BANKRUPTCY COURT

FOR THE WESTERN DISTRICT OF MICHIGAN

IN RE

RICHARD L. FISHELL and
DOROTHY M. FISHELL

Debtors

Chapter 7
Hon David E. Nims Jr
Case No NG90-85144

ORDER DENYING MOTION FOR RECONSIDERATION AND AWARDING SANCTIONS

At a session of said Court held in the U.S. Bankruptcy Court, Western District of Michigan, this 25th day of August 1992.

PRESENT: HON DAVID E. NIMS, JR.
U.S. Bankruptcy Judge

The Debtors' Amended Motion for Rehearing and/or Reconsideration of an Order approving the settlement of a certain adversary proceeding between the debtors, as plaintiffs, and Robert and Rosalee Soltow, as defendants (Adversary Proceeding No: 91-8015), having come before the court, the court having heard argument of counsel and finding

that there is no basis for the Debtors' Motion and that the imposition of sanctions under Federal Rule of Bankruptcy Procedure 9011(a) is warranted, the court being otherwise fully advised in the premises;

NOW, THEREFORE, IT IS HEREBY ORDERED that the Debtors' Amended Motion for Rehearing and/or Reconsideration of Order Approving Settlement be and hereby is denied.

IT IS FURTHER ORDERED that Roger L. Fishell, the attorney signing the motion, shall pay to Robert Soltow and Rosalee Soltow, through their counsel, Mark A. Bush, the sum of one thousand and 00/100 ($1,000.00) dollars and shall pay the Chapter 7 Trustee, John A. Porter, the sum of five hundred and 00/100 ($500.00) dollars as sanctions for violating Federal Rule of Bankruptcy Procedure 9011.

IT IS FURTHER ORDERED that a copy of

this order be served by ordinary first-class mail upon the following interested parties: Richard L. and Dorothy M. Fishell, 13625 Tallman Road, Eagle, MI 48220; Roger L. Fishell, Esq., 1900 Main Street, Suite 214, Sarasota, FL 34236; Robert and Rosalee Soltow, 13665 Tallman Road, Eagle, MI 48822; Mark A. Bush, Esq., Fraser, Trebilcock, Davis & Foster, 1000 Michigan National Tower, Lansing, MI 48933; John A. Porter, Esq., 622 Commerce Building, Grand Rapids, MI 49503; Harold E. Nelson, Esq., Clary, Nantz, Wood, Hoffius, Rankin & Cooper, 500 Calder Plaza Building, 250 Monroe Avenue, N.W., Grand Rapids, MI 49503; and U. S. Trustee, 190 Monroe Avenue, N. W., Suite 200, Grand Rapids, MI 49503.

__/s/_____
Hon David E. Nims Jr.
U. S. Bankruptcy Judge

Return service copies to:
Harold E. Nelson, Esq.
500 Calder Plaza Building
250 Monroe Avenue, NW
Grand Rapids, MI 49503

UNITED STATES BANKRUPTCY COURT

WESTERN DISTRICT OF MICHIGAN

In re

RICHARD & DOROTHY FISHELL
Debtors Case No NG90-85144

RICHARD & DOROTHY FISHELL
Plaintiffs

v Adv Pro No 91-8015

ROBERT & ROSALIE SOLTOW

Defendants

APPEARANCES:
ROGER L. FISHELL, ESQ.
1900 Main St #214
Sarasota, FL 34236
On behalf of the Debtors

MARK A. BUSH, ESQ.
1000 Michigan National Tower
Lansing, MI 48933
On behlf of the Soltows

HAROLD E. NELSON, ESQ.
500 Calder Plaza
Grand Rapids, MI 49503
On behalf of the Trustee

TRANSCRIPT

This is a transcript of the hearing on the Motion for Rehearing held on Friday,

August 21, 1992, at Grand Rapids, Michigan before the HONORABLE DAVID E. NIMS, JR., U.S. Bankruptcy Judge. (p2)

The Clerk: Richard and Dorothy Fishell.

The Court: This case is before the court for a hearing on the motion for rehearing of an order approving a settlement. Record may indicate the appearance of Mr Roger L Fishell, Attorney for the Debtors. Are there any other appearances?

Mr Bush: Yes, your Honor. Mark Bush on behalf of Mr and Mrs Soltow.

The Court: Any--

Mr Nelson: Your Honor, Harold Nelson representing the Chapter 7 Trustee, John Porter, and the record should reflect that Mr Porter is also in the courtroom.

The Court: All right. Any other appearances? Apparently not.

Mr Fishell you may proceed.

Mr Fishell: Your Honor, this is a

motion for rehearing as to the court's prior approval of the settlement of the adversary proceeding of the Fishells v. Soltow. Much of--Much of the grounds that are alleged in the motion for rehearing have been touched upon by both Mr Turner at the hearing approving the settlement and by myself at the prior hearing on the objection to Mr Soltow's claim. Now primarily the basis for the objection and the request for rehearing, aside from the fact that we contend that the settlement was not within the realm of reasonableness, is that it's generally construed in (p3) the rules and in the case law is that the manner in which the court entered upon its consideration of that settlement proposal in reaching the conclusion that the case should be settled. Now these matters are not insignificant. This involves a substantial, probably the most substantial potential

asset that the estate held in this case.

Hearings at which settlements are made and approved are designed to be something more than just merely going along with what the trustee and the creditor have entered into on their own. It's not supposed to be something that the court approves just as a matter of form. The rule on approving settlements contemplates something in the order of an evidentiary hearing. Witnesses should be examined, if--if the issues call for it. I think there needs to be something in the record.

The Court: Didn't you have an opportunity to present witnesses at the hearing?

Mr Fishell: Your Honor, if you will recall, at the hearing, Mr Turner was present on behalf of the Debtors arguing in opposition. Now under the rule, the Trustee or the proponent of this

settlement has the burden of proving to the court, establishing adequate grounds for approval of that settlement. There were no witnesses called by either Mr Soltow or the trustee. This is the major problem that I had--that I do have with the manner in which this was approved. It's not a question of whether I can parade in 12 witnesses to (p4) testify to this, that or the other thing.

The Court: Well, one--one--Just a moment. One of the purposes of a settlement is to avoid a lot of time by the court and a lot of expense for the other parties, and that's the whole purpose of the settlement. An officer of this court has come and has presented this as being a good settlement. No creditor objected. The only ones that have objected is the debtor himself and I am not sure that

the debtor has even a position to be heard on this but we have allowed him to be heard. And he could have brought in any testimony he wanted, if he desired to do so.

Mr Fishell: Your Honor, I understand that. I believe the debtor has standing in this case. This is not a no asset case. The debtor certainly has standing to object to a settlement of this nature. Secondly, it's not the burden on the party opposing the settlement to come forward with evidence to show that the settlement should not be approved. The burden of proof is on the proponents of the settlement to establish---

The Court: No. No. No.

Mr Fishell: --in the record before the court so the court can have an adequate basis to determine whether that settlement meets the standards of

reasonableness or not. The record can't simply be devoid of anything in the way of evidence or testimony that supports the reasonableness of that settlement. And that's exactly what we had in this case, (p5) because neither Mr Nelson nor Mr Bush presented any evidence at the hearing. This is my objection. The settlement--The settlement--

The Court: This court--This court has hearings on settlement. On a motion day, we'll have several hearings on a settlement. In almost every case, as in this case, nobody shows up to question the settlement. In fact, the court has the right not even to notice out a settlement for the people to be heard. Rule 2002 does state that notice will be given to all creditors but that the court can dispense with the notice if the court deems this to be necessary. I didn't--I, in this case, I did notice

it out. But there are many settlements we don't even have to notice out. I don't know what your basis is.

What are your relying on to--What is your authority for the fact that we have to have a full blown hearing on every settlement that this court has before it?

Mr Fishell: Your Honor, I'm not suggesting that we have a mini trial of the trial of the adversary proceeding.

The Court: No. But what is your authority that we have to have a full hearing or a hearing of any kind in this?

I'll read you 2002.

"Except as provided in subdivisions.." And certain other subdivisions.

"the clerk, or some other person as" (p6)
"the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees not less than 20 days notice by mail of"

And then you go down the list.

> "the hearing on approval of a compromise or settlement of a controversy, other than approval of an agreement pursuant to Rule 4001(d), unless the court--"

Got to turn the page here. I can't get the pages. Pages are stuck together. Do you want to get me another book? Do you have one down there?

Oh, okay. Here we are. Okay.

> "the hearing on approval of a compromise or settlement of a controversy, unless the court for cause shown directs that notice not be sent."

So you don't even have to give the notice if some cause is shown.

There was no cause shown in this case so--

Mr Fishell: Well, your Honor, I would like to--

The court: --we did give the full notice.

Mr Fishell: Well, your Honor, I'm not complaining about the notice aspect of the hearing on the settlement, approving

the settlement. My contention is that-- it's that if the settlement is being proposed, the proponents have the burden of presenting to the court enough of the facts and circumstances in evidentiary form that would permit the record to show, would permit the court to have a basis for concluding (p7) that the settlement was fair and reasonable under all the circumstances.

The Court: Was that your argument at the original hearing?

Mr Fishell: At the original hearing, your Honor, Mr Turner was arguing in opposition to the approval--

The Court: Well,--

Mr Fishell: --of the settlement.

The Court:--did you handle the original hearing?

Mr Fishell: No, your Honor, I did not.

The court: Well, this is a motion for rehearing. How can you come in here and--

Mr Fishell: Your, Honor,--

The Court: --represent the Fishells--

Mr Fishell: Your Honor,--

The Court: --if you weren't present at the original hearing?

Mr Fishell: If your will recall, your Honor, Mr Turner did note at that hearing that I was present and in fact I was present. Mr Turner handled the argument of the hearing.

I would like to present copies of a couple of--Well, I have three or four here cases which you are free to examine regarding the standards that are to be applied by the court in considering approving a proposed settlement. (p8)

The court: Were these cited to the court at the original hearing?

Mr Fishell: I believe not, your Honor, no.

The Court: Were they available at that time?

Mr Fishell: I don't believe that I had

them in my possession at that time. If your recall, your Honor, Mr Turner submitted to you at that hearing a memorandum on the subject of Mr Soltow's counterclaim regarding slander of title. His major contention at that hearing was that there was no reason to compromise this case, certainly not for the sums that were being proposed, because the slander of title counterclaim was essentially nonexistent. If there was no slander of title counterclaim, if there was no $250,000 suit or countersuit, there was no reason for the trustee to get nervous and want to settle this case because the estate wouldn't be at risk by continuing the adversary proceeding against Soltow.

The Court: Well, we'll have to take our morning recess at this time. We will reconvene in 20 minutes.

(Court took a recess)

The Court: All right. Mr Fishell.

Mr Fishell: Your Honor, I'll provide these to you now, these cases I was referring to. In Re Lion Capital Group, 49 BR 163, In Re Correa, 123 BR 153, In Re Trout, 108 235, In Re Goldstein, 131 367, and In re Energy Co-Op at 886 F 2d 921, also In Re A & C Properties at 784 1377. Those (p 9) cases I believe illustrate the burden that's placed upon the proponent of a settlement, and what standards the court must hold them to, and what the evidence must show in order to establish an adequate basis for determining that the matter is settled in a reasonable fashion with full information as to the propriety of the settlement.

Now the settlement agreement in this case does not recite-- does not recite any of the matters respecting a number

of the issues that were raised in the Fishells; complaint including the lack of the failure of consideration for the deed in lieu of foreclosure. The documents themselves don't adequately disclose what the consideration is. It doesn't reveal in any--in any manner that the deed in lieu of foreclosure or any other documents contemplate that the right of redemption which attends every mortgage is being specifically waived. All these things that go into the issue of whether or not Fishells' original claim had substantial merit to it. The issue of usury is not addressed. Mr Turner did a very thorough analysis if the usury issue on the--in the motion for summary judgment. I think that Mr Soltow has conceded that usury was involved in various of the notes that were consolidated into the amended promissory note.

I think the transaction was one that should have been set aside.

I think the lis pendens was properly filed in the case. I don't think it supports any claim or cause of action (p10) for slander of title. I haven't seen any legal authority provided by any of the opponents that would make me believe otherwise. That was one of the things they should have established before this court as a means of apprising you of whether or not you should approve that settlement. They should have been able to show us how this slander of title claim was so viable, how much it was worth, and why the case should be compromised in the manner and in the amount that it was.

In addition, there is one other matter that was raised to me by Mr Barry Gates who is an attorney who is an attorney who is handling the

Fishell malpractice case against the Fraser law firm now pending in Circuit Court in Ingham County. And at p 3, the second--the full first complete paragraph he contends or believes, or suspects, or fears, perhaps, that that paragraph contains such a broad discharge of Mr Soltow's attorneys arising for acts arising out of the real property transaction at issue here that he fears that this may provide a defense to them in that malpractice claim. I don't see anywhere in the settlement agreement that that was contemplated by either Mr Porter or Mr Soltow, but the language is broad enough to cause him to fear that that may be the case. And, if your Honor does nothing else on this motion for rehearing, it should be at least clarified to make specific exception to that malpractice claim which I understand the Trustee intends to pursue just so that that could be

completely (p11) divorced from the settlement of this particular adversary proceeding, that should be specified in any order you make as a result of today. But I think--I think the order approving that settlement needs to be vacated. The order--The order dismissing the claim and the counterclaim discharging the lis pendens should be set aside.

The Court: All right. Mr Bush.

Mr Bush: Thank you, your Honor. Your Honor, on behalf of the Soltows, I would like to briefly make several points about this motion this morning. The first is that this is the third occasion that we have been over this same ground; that is, the settlement of the adversary proceeding. All of these arguments were made on July 10. They were made again on (August 7) under the guise of an objection to the coun-

terclaim. At that point the court properly ruled that that objection had been mooted by the earlier settlement. We are here again today. I don't think we have heard any new argument that wasn't raised at any of the earlier hearings particularly, the July 10. The purpose of a motion for rehearing is not to go over the same ground again and we object to the proceeding being used in that fashion.

With respect to the settlement itself, this is a situation in which following the conversion of the case to a Chapter 7, an experienced trustee was appointed who probably in his discretion could have settled this case rather quickly. (p12) Instead, to his credit, he chose to hire outside counsel to independently go over the case, make recommendations for settlement, and pursue negotiations to resolve the case. This took place over a period

of months. All the information was brought to the attention of the trustee and the trustee did what he felt was in the best interest of the entire estate. As the court has noted, not a single person has objected to the settlement, not a single creditor, other than the debtors who would be expected to object.

As the court further pointed out, the court has been more than fair and patient and lenient with the debtors. The court could have approved the settlement in chambers by issuing an order. It didn't do that. It noticed it out. It again heard argument not only on July 10 but again on (August 7) and again today. The court didn't need to do that but the court did that to be fair to the debtors.

I don't want to take the time to go through all the points brought up in the motion. But we think it's well within the court's experience that it is not

customary to make the trustee take the stand and be subject to cross-examination, which in this case, your Honor, I can assure you, the intent by Mr Turner would have been to grill John Porter for hours about why he did this or why he did that. We don't think that the bankruptcy court is designed to put a trustee through that type of grilling in order to get a simple settlement approved. We (p13) think that would have been improper. We think that what is going on here is an attempt to try to relitigate the whole adversary proceeding under the guise of a motion to approve the settlement. We think that's improper. So for these reasons, your Honor, we would ask that the motion be denied.

This is the third time I've been over from Lansing on this matter and I am hopeful that at this point this will be the last hearing the court will ever

have on this adversary proceeding. And that the relief, if any, for the debtors will come from the Appellate court.

This being the third time we have been over on this, your Honor, we would ask for sanctions under Rule 11. We would ask for $1,000 assessed against Mr Fishell, Roger Fishell, not against the estate. The estate does not deserve that. But we have an attorney here, actually two attorneys who are putting the court and the party through a lot of nonsense is what we believe it is and we think it ought to stop. And we would ask that the motion be denied and that sanctions in the amount of $1,000 be assessed.

The Court: Mr Nelson.

Mr Nelson: Thank you, your Honor. For the most part, I agree with Mr Bush. I think that this indeed is the third time we have covered the ground concerning the merits of the case and how it was

evaluated. Quite frankly, I have never spent as much time in my career trying to evaluate the merits (p14) of a claim and counterclaim as I have in this case. My file in this matter is a foot thick. And for all intents and purposes, it's been solely--my services have been confined to attempting to evaluate and ultimately resolve this one adversary proceeding. We went so far as to conduct a lengthy Rule 2004 examination of Richard Fishell before we ever made our final determination as to what should be done with this adversary proceeding. Suffice it to say, we have a different view of the merits than do the debtors.

The only new issue that I believe has been raised by the debtors in this motion for reconsideration is essentially the question of whether the settlement agreement whereby this adversary proceeding was resolved somehow releases the Fraser

law firm from a pending malpractice case in the Ingham County Circuit Court. I can state unequivocally that it was not the trustee's intention to release anyone from any other litigation. The intention of the trustee was to simply resolve the Soltow adversary proceeding, not to resolve in any manner the pending malpractice claim against the debtors--against the Fraser firm. I believe that Mr Bush shares that interpretation of the settlement agreement that indeed it does not release, or somehow resolve, or discharge the malpractice action. For the record I should state, however, that the Trustee has not made a determination whether the estate intends to pursue that action or not. Quite frankly, we have not even begun to evaluate the (p15) merits of that case. And I guess that's something that's left for the trustee and counsel to do on another day. But, to clarify, I guess

the impact of this settlement agreement on that other litigation, I would ask that Mr Bush indicate to the court the interpretation of his law firm with respect to whether or not it is somehow released from any potential liability under that Ingham County Circuit Court action.

Mr Bush: I agree with Mr Nelson, your Honor. The intent of this settlement was to have nothing to do with the malpractice case. We studiously attempted to keep them separate, primarily for the benefit of our client, Mr Soltow. There may be some issues that are related, obviously if you look at the complaint and the two cases, they all say about the same thing. That Mr Fishell didn't understand these documents and so forth when he entered into them. There may be some questions interms of res judicata of the decision that Judge Eveland made back in Ingham County Circuit court back in 1990 but, as far as this

settlement agreement, we do not view that as releasing ourselves from that Ingham County malpractice litigation.

The Court: Anything further, Mr Fishell?

Mr Fishell: Just briefly to reiterate, your Honor. I think that it's unfortunate. Personally, I believe this--this whole thing should have been resolved otherwise. But, aside from that, forgetting that for a minute, in order for (p16) the court to appropriately determine a proposed settlement, the court must do something more than rely upon essentially what are little more than general representations made by the proponents of the settlement. In order for the court to validly determine the reasonableness of a settlement, it must make some independent examination of the facts and the circumstances surrounding the case and what the trustee went through in arriving at his conclusion. That wasn't done in this case. That's the

reason for the motion. That's the reason that this matter should be set aside and reheard.

Thank you, your Honor.

The Court: This case comes before the court for a hearing on a motion by Richard L. Fishell and Dorothy M. Fishell for a rehearing or a reconsideration of the previous order of this court approving a settlement of adversary proceedings between the debtors and Robert Soltow and Rosalie Soltow.

The underlying proceedings in this case commenced sometimes prior to the filing date of this case. There was a case pending in the state court, as I recall, and had been pending for some time at the time that this voluntary Chapter 11 proceedings was filed by the Fishells with this court. That adversary proceeding was brought over from the state court to this court as an adversary proceeding and has been pending

ever since until the attempt to settle the proceedings after the Chapter 11 case had been converted to a case under Chapter 7.(p17) The original case, as I recall, and it's been so long now I may be a little hazy on the facts, but it involved a mortgage or land contract, I don't remember which, between the Soltows and the debtors. There had been nonpayment on the mortgage--or it's a land contract--for some time and finally there had been a foreclosure proceedings commenced. And, as a settlement of that foreclosure proceedings, there was worked out a proceedings where the Soltows executed a dicharge of the mortgage in question. I guess it must have been a mortgage now because I think it was a discharge of the mortgage, or maybe it was a quitclaim deed, I can't remember which, but one of the two. And also the debtors executed a deed to the property in question. These documents

were turned over to Transamerica Title Company, as I recall, a completely disinterested party. And the agreement was that if a payment was not made on the-- or if the mortgage was not paid, the American Title Company would turn over the deed to Mr Soltow. If the money were paid, then the title company would turn over a full discharge to the Fishells. The money was not paid and the American Title Company did turn the deed over to Soltows. So there was a deed on record from the Fishells to the Soltows and this was duly recorded. And then this proceedings, the adversary proceedings was then brought in the state court to set aside the deed and to indicate that it was actually a mortgage. The case was--lingered for a long time in the state courts and then was (p18) brought into this court.

There was delay, after delay, after delay.

The court did everything possible to try to move this case along but everytime that the court would take some action, there would be counteraction by the Fishells and their attorney to delay the matter further. Finally we had a pretrial on the proceedings. One of the things that came up at the time of the pretrial was a matter of a jury trial. And here again the court felt that there was no right to a jury trial under these-- under the provisions, and the court held that we would proceed and a trial date was set, we would proceed with a speedy trial. However, before the trial date came, there was an appeal taken to the District Court, as the Fishells had the right to do, on the matter of the jury trial. That matter lingered for some time before the District court and eventually the District Court affirmed the bankruptcy court and returned the matter to

the bankruptcy court.

And then I can't remember just what happened after that but somewhere along the line there was a transfer of the case to case under Chapter 7. And I believe that when Mr Porter got into the matter, for the first time there was progress made and for the first time the matter was brought to a settlement. Mr Porter felt that under the circumstances he should obtain an expert bankruptcy attorney. He retained Mr Nelson's firm. Mr Nelson did agree to handle the case. As Mr Nelson (p19) has indicated here today, he spent a lot of time investigating into whether or not there should be a settlement and there were a lot of reasons for the settlement. And the court felt that the settlement was reasonable and the court approved the settlement.

Since then, we have had--the Fishells

have objected to the settlement. They're the only ones that have objected, the debtors themselves. And not one creditor objected.

The whole purpose of the right to settle proceedings especially in the bankruptcy court is to prevent what has happened here, untold amount of fees that have been generated because of the tremendous number of delays that have taken place in this court and not only in the adversary proceedings but in other ways.

So this court is satisfied that there is no basis for the objection. The court feels that the only thing that this hearing today has caused is more expenses, more reason why the creditors of the Fishells would not receive any funds on hand. Not only has the estate had more fees run up by reason of the attorney, the appearance of the attor-

ney and the appearance of the trustee in this--at this hearing, but also Mr Soltow, he's had ample expenses. He's had to pay the taxes on this property over all this time. I have not heard that the Fishells ever claimed that they were the persons that should pay the taxes. I don't think they have paid them. I (p20) think, as I recall, the testimony was that Mr Soltow has paid all the taxes, all the expenses on the property. Not one cent has been paid by the Fishells, at least there's been no testimony in that court--in this court to that effect. So the court would hold that the motion for reconsideration is dismissed and denied.

Now the question comes up as to sanctions. Mr Bush has asked for sanctions. Certainly the estate should not have to pay more money of the creditors for the expense that has

been incurred in getting ready for this hearing and for the holding of the hearing itself. The only thing here is of course Mr Nelson didn't have to come from Lansing as did Mr Bush. So I guess now, Mr Fishell, the court would ask you, is there any reason why sanctions should not be imposed under Bankruptcy rule 9011, Rules of Civil Procedure 11?

Mr Fishell: Well, your Honor, as I understand that rule, that requires something to be done that is unnecessarily--unnecessary and basically frivolous. None of the arguments that I have advanced either today or the last time that I was here should be categorized in that nature.

The Court: We're not talking about any sanctions for any hearing except the one today. You had the perfect right to make the hearings the last

time but this time we are re-- as far as the court can determine, we are just going right over the same materials, the same matters that we had before.(p21)

Mr Fishell: I understand that, your Honor. But one of the purposes of a motion for rehearing is to offer you an opportunity to correct something that you may have made a mistake about the first time, even if it's not something new and completely different. I mean, why would you have a rehearing if you had to dredge up something new that you didn't argue the first time? That wouldn't --That wouldn't make any sense. You might--could--You might be faced with the argument if you didn't raise it before, it was waived. So one of the purposes of a rehearing, to my way of thinking, is to point out to the court where they made a mistake

the first time. That's perfectly proper. It's perfectly reasonable.

Now I agree that when I was here the prior time on the objection to claim, that matter was set by the court and I appeared. I came from Florida. I came from Florida again today. This hearing today is perfectly proper. It's provided for by the rules. If nothing else, we have addressed an issue in the - in the settlement agreement that we didn't cover before. Mr Bush and Mr Nelson have both acknowledged that that point on that point that there was no intent to abandon or compromise the malpractice claim. That was the basis of my argument on that point. And I still--I stand by the arguments that I have made today. I have made them in good faith. I believe the law supports the positions I have taken. This (p22) is not some-

thing that I have come here merely for the purpose of delay or expense because I have had to be put to some expense of my own. And that's why I don't think that any--anything in the nature of sanctions are appropriate.

The Court: Mr Nelson.

Mr Nelson: Well, your honor, as I indicated in my prior remarks, the only thing that I saw that was new in the motion for reconsideration was this, I guess, request or issue raised as to how does this settlement attempt to affect the malpractice case? But I don't think that was necessary because I mean there was no-that was not an issue as between the trustee and Mr Soltow's counsel. We understood how it affected that case. It didn't affect that case. It was never intended to affect that case. It seems that this was an issue or a

question only in the minds of the Fishells; it certainly wasn't a question in our mind. Nothing has really been clarified that--except perhaps to the debtors. It was already clear, there was a clear understanding between us and the Soltows and the counsel.

Mr Fishell: Your Honor, if I could respond to that. As I mentioned earlier it was Mr Gates who is the attorney who was hired by the Fishells to prosecute that malpractice claim who when he received this sometime after it was approved raised this issue with me. I made that a part of my motion because of his concerns. Now, if for some reason the (p23) trustee were to abandon that case to the Fishells, then cetainly the Fishells would have an interest in knowing and having it clarified, because how--what would be-

what would prevent the Fraser firm from raising that issue as a defense in the circuit court case if it ever came to that? Now it's fine that the trustee and Mr Bush recognize between themselves the meaning of it. Mr Gates was concerned, that's the reason it was raised. And if there is something that can be made a part of the order today that clarifies that point, I think that would serve the interest of all in the end.

The Court: I'm not clear. Is the malpractice suit, is that an asset of this estate? That--Isn't that for things that happened after the filing of the original petition back in 19--Let's see.--1990?

Mr Bush: Your Honor, what has been alleged is arises out of the same nucleus of operative fact as does the adversary proceeding. In other words,

the allegation is that when these documents were drawn in '88, the escrow agreement that the attorney for my firm who did that, Mr Austin, did so improperly and in a way the Fishells contend was malpractice.

The Court: Does this go back to '88?

Mr Bush: Yes

The Court: Longer than I thought. Four years.

Mr Bush: Your Honor, we think that case is probably more frivolous than this case, given that Judge Eveland (p24) in the state court has already entered a three page opinion after hundreds of pages of testimony finding no improprieties on the part of our firm.

The Court: But that was before the filing so it would be an asset of this estate.

Mr Bush: Interestingly, your Honor, that that case was filed prior to the

bankruptcy filing, was not disclosed, was concealed from this court at the time of the bankruptcy filing and only came up upon further discovery and an amended schedule. So this is also something that bears on this.

Mr Fishell: Your, honor, there is--there was never--That's been an allegation all along that was willfully concealed. That's not the case. But the suit was--

The Court: Well, it was put in the schedules then?

Mr Fishell: It was omitted from the original schedules, that's correct, your Honor. He is correct on that point.

The Court: Well, it was concealed then. The schedules were signed under penalty of perjury.

Mr Fishell: That's correct, your Honor. But there is--I deem a difference bet-

ween inadvertence and concealment. That's the point I was trying to make. But this suit was commenced prior to the petition being filed.

The Court: It shows they didn't think much of, their suit to start with.(p25)

Well, the court is of the opinion that sanctions should be imposed upon counsel and sanctions will be allowed in the sum of $1,000 for the payment of the fees and expenses of Mr Soltow. And the court, as the court has stated, certainly the creditors should not have to pay for this unnecessary proceeding. And so the court would indicate that there shall be paid to the estate the sum of $500 to cover preparation and the attendance of this proceeding by Mr Nelson.

Mr Nelson, would you prepare the orders for the Court?

Mr Nelson: I will, your Honor. Am I

correct on the sanctions are on the debtors' counsel?

The Court: On Mr Fishell. Roger Fishell.

Mr Nelson: Okay. I will prepare the order, your Honor.

The Court: I assume that he's the one that signed the motion. Mr Turner did not sign the motion.

Mr Bush: That's correct, your Honor.

Mr Fishell: That's correct, your Honor.

Mr Bush: Thank you, your Honor.

The Clerk: How about the other one, Judge?

The Court: Pardon?

The Clerk: The other Fishell matter.

The Court: Oh, we have another Fishell. Well, that matter is moot now. That was for a stay pending the (p26) court's determination of the reconsideration. Since the court has already done that

and disposed of that matter, that matter is moot.

Mr Bush: Thank you, your Honor.

Mr Fishell: Thank you, your Honor.

Mr Nelson: Thank you, your Honor.

***

REPORTER'S CERTIFICATE

I, Gail L. Beach, do hereby certify that the foregoing is a true and accurate transcript of the hearing held on Friday, August 21, 1992, at Grand Rapids, Michigan, before the HONORABLE DAVID E. NIMS, JT., U. S. Bankruptcy Judge, consisting of 26 pages.

___/s/_____
Gail L. Beach, CSR2574
Certified Shorthand Reporter
6863 Mildred SE
Grand Rapids, MI 49508

UNITED STATES BANKRUPTCY COURT

WESTERN DISTRICT OF MICHIGAN

In Re:

Richard L. Fishell and

Dorothy M. Fishell

Case No NG90-85144

Debtors

Richard L. Fishell and

Dorothy M. Fishell

Plaintiffs

vs Adv Proc No 91-8015

Robert Soltow and

Rosalee Soltow

Defendants

Harold E. Nelson P27974
Attorney for John A. Porter,
Trustee of the Estate of
Richard L. and Dorothy M.
Fishell, Debtors
500 Calder Plaza
Grand Rapids, MI 49503
(616)459-9487

Mark A. Bush P35775
Attorney for Soltows

1000 Michigan National Tower
Lansing, MI 48933
(517) 482-5800

ORDER

At a session of said Court, held in the City of Grand Rapids, Michigan, this 24th day of July 1992.

PRESENT: HONORABLE DAVID E. NIMS JR.

U.S. BANKRUPTCY JUDGE

The Debtors, Richard L. Fishell and Dorothy M. Fishell, having filed a document on June 22, 1992 entitled Objection to Claim, the same pertaining to a certain slander of title claim raised by Robert Soltow in the above referenced adversary proceeding, said Debtors' Objection having come on for hearing before the court on July 22, 1992, the court having heard oral argument and having otherwise been fully advised in the premises;

IT IS HEREBY ORDERED AND ADJUDGED that the aforementioned claim by Debtors is moot because of the court's July 10, 1992 approval of settlement of the adversary proceed-

ing, said settlement including disposition of the slander of title claim made by Robert Soltow. The request for sanctions made by counsel of Robert Soltow is hereby ordered held in abeyance pending hearing on a motion for reconsideration/rehearing filed on behalf of the Debtors.

____/s/_____
David E. Nims, Jr.
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

FOR THE WESTERN DISTRICT OF MICHIGAN

IN RE

RICHARD L. FISHELL and Case No 90-85144

DOROTHY M. FISHELL

Debtors

_____/

RICHARD L. FISHELL and

DOROTHY M. FISHELL

Adv Pro No 91-8015

Plaintiff/Appellants

v.

ROBERT SOLTOW and

ROSALEE SOLTOW

Defendants/Appellees

_____/

Harold E. Nelson
Attorney for Trustee, John Porter
500 Calder Plaza
Grand Rapids, Michigan 49503
(616)459-9487

Mark A. Bush
Attorney for Defendants
1000 Michigan National Tower
Lansing, Michigan 48933
(517) 482-5800

_____/

AMENDED

MOTION FOR REHEARING AND/OR RECONSIDERATION OF ORDER APPROVING SETTLEMENT

Pursuant to Rule 9023 of the Bankruptcy Rules of Procedure the Debtors move the court for rehearing and/or reconsideration of the order of this court entered on the 14th day of July 1992 wherein the court approved the settlement of the above styled adversary proceeding and the Debtors show as grounds:

1. The court failed to conduct even the most rudimentary evidentiary inquiry into the merits of the Trustee's motion or the legal issues raised by the complaint and counterclaim.

2. The court failed to require any support, by way of citation of legal authority, for the position adopted by the

Trustee on any legal issue raised by the complaint or counterclaim. The failed entirely to consider the legal argument presented by the attorney for the debtors when offered at the hearing.

3. The court failed to consider significant legal issues raised by the complaint such as usury, the circumstances surrounding the execution of the documents on 25 August 1988 and the role of the Soltows'/ Fishells' common attorney in procuring same; the law regarding the construction of deed as mortgage when given under circumstances of this case; misinformation and misrepresentation concerning the documents and their legal effect and the issue of fraud. Further, the court failed to consider the substantial absence of merit associated with the counterclaim for slander of title in that neither the Trustee nor Soltows presented any legal authority for the proposition that the

filing of a lis pendens would serve as any basis for such a claim. Further, the Trustee and Soltows failed to note any statutory basis for such a cause of action.

4. The arguments advanced by the Trustee and Soltows were couched in generalities and were speculative in nature. Insufficient evidence was offered to support any of the reasons advanced in support of approval of the settlement.

5. The court's ruling, announced orally at the conclusion of the argument, conceded the possibility of error in recollection and focused primarily on the origin of the Fishell/Soltow dispute in 1988. The court focused only on its having originated as an agreement and did not consider the circumstances alleged in the complaint which would have vitiated any such agreement.

6. The court failed to require any

concrete showing from the moving parties which would have been sufficient to meet the test of reasonableness required for such compromises and the court failed to adequately apprise itself of sufficient facts upon which to render an informed decision as to any aspect of the complaint or counterclaim. In particular, the court was provided with no support for the purported slander of title claim nor how Soltows' damages, if any, might be estimated.

7. The court misapprehended the purpose and effect of the lis pendens, failed to consider how Soltows' might have mitigated any "damages" suffered and failed to note how any such damages are limited by the applicable statute.

8. The slander of title claim was not adequately considered by the court or the moving parties and its lack of merit was of particular significance.

Without a slander of title claim, the estate was not at any arguable risk should the litigation continue. The court should have given greater attention to this issue particularly where an objection specifically directed to that claim was noticed for hearing before the court.

9. The court, in its oral ruling, focused also on what it considered delays and speculated about future delays. This was not warranted given that the trial was set for August 1992. The reference to delay attending the appeal of the jury issue was also unwarranted because it was a meritorious issue which the debtors raised.

10. The settlement requires clarification to the extent that it may have any effect on the legal malpractice claim pending in the Ingham County Circuit Court. To the extent that the settlement and the

order approving it may be construed as relieving the Fraser law firm of liability on such claim, the settlement and court approval was entirely in error, was without consideration, was without appropriate notice and was without explicit factual or legal basis.

Wherefore, the Debtors pray the court to grant any and all relief appropriate with respect to the order of 14 July 1992, including but not limited to vacating the same in its entirety, and to grant any and all relief appropriate under Rule 9023.

__/s/_____
Roger L. Fishell
1900 Main Street, Suite 214
Sarasota, Florida 34236
(813) 351-2883
Attorney for Debtors

(Certificate of Service Omitted)

UNITED STATES BANKRUPTCY COURT

WESTERN DISTRICT OF MICHIGAN

IN RE

RICHARD L. FISHELL and
DOROTHY M. FISHELL

Debtors

Case No N90-85144
HON DAVID E. NIMS JR

Chapter 11

_____/

RICHARD L. FISHELL and

DOROTHY M. FISHELL

Plaintiffs

Adversary No 91-8015

v.

ROBERT SOLTOW and

ROSALEE SOLTOW

Defendants

_____

Harold E. Nelson
Attorney for John Porter, Trustee
of the Estate of Richard L. Fishell
and Dorothy M. Fishell, Debtors
500 Calder Plaza
Grand Rapids, Michigan 49503
(616)459-9487

Mark A. Bush
Attorney for Defendants
1000 Michigan National Tower
Lansing, Michigan 48933
(517) 482-5800

STIPULATION AND ORDER OF DISMISSAL AND CANCELLATION OF LIS PENDENS

The parties hereby stipulate and agree that the above-referenced adversary proceeding having been amicably resolved pursuant to Release and Settlement Agreement of June 12, 1992, thesame being incorporated herein by reference, the same shall be dismissed with prejudice and without costs to any party. The parties further hereby stipulate and agree that a certain Notice of Lis Pendens, described in the aforementioned Release and Settlement Agreement and recorded in Liber 795, Page 409 with the Eaton County Register of Deeds on May 1, 1989 with respect to certain real property described in the aforementioned Release and Settlement Agreement is hereby can-

celled.

_/s/_____	__/s/_____
Harold E. Nelson	Mark A. Bush
Attorney for	Attorney for Soltows
Trustee of Fishells	
Dated: 7/14/92	Dated: July 13,1992

ORDER

At a session of said Court, held in the City of Grand Rapids, State of Michigan this 20th day of July, 1992.

PRESENT: HONORABLE DAVID E. NIMS JR., U. S. Bankruptcy Judge

Upon reading and filing the Stipulation of the parties hrein and the Court being fully advised in the same:

IT IS HEREBY ORDERED that the above-referenced advesary proceeding having been amicably resolved pursuant to Release and Settlement Agreement of June 12, 1992, the same being incorporated herein by reference, the same shall be and are hereby dismissed with prejudice and without costs to any party.

IT IS FURTHER ORDERED that the Notice of Lis Pendens recorded in Liber 795, Page 409 Eaton County register of Deeds on May 1, 1989 is hereby cancelled.

__/s/_____
DAVID E. NIMS JR.
U. S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

WESTERN DISTRICT OF MICHIGAN

IN RE

RICHARD L. FISHELL and
DOROTHY M. FISHELL

Debtors

Case No N90-85144
HON DAVID E. NIMS JR

Chapter 11

RICHARD L. FISHELL and

DOROTHY M. FISHELL

Plaintiffs

Adversary No 91-8015

v.

ROBERT SOLTOW and

ROSALEE SOLTOW

Defendants

Harold E. Nelson
Attorney for John Porter, Trustee
of the Estate of Richard L. Fishell
and Dorothy M. Fishell, Debtors
500 Calder Plaza
Grand Rapids, Michigan 49503
(616)459-9487

Mark A. Bush
Attorney for Defendants
1000 Michigan National Tower
Lansing, Michigan 48933
(517) 482-5800

STIPULATION AND ORDER OF DISMISSAL

OF COUNTER-CLAIM

Now come the parties hereto, by and through their attorneys, and hereby stipulate and agree that the above-referenced adversary proceeding having been amicably resolved, the counter-claim brought by Defendants Robert Soltow and Rosalee Soltow against Debtors Richard L. Fishell and Dorothy M. Fishell shall be dismissed with prejudice and without costs to any party.

___/s/_____	__/s/_____
Harold E. Nelson	Mark A. Bush
Attorney for Trustee of Fishells	Attorney for Soltows
Dated: 7/14/92	Dated: July 13,1992

ORDER

At a session of said Court, held in the City of Grand Rapids, State of Michigan this 17th day of July,

1992.

PRESENT: HONORABLE DAVID E. NIMS JR.,
U. S. Bankruptcy Judge

Upon reading and filing the Stipulation of the parties herein and the Court being fully advised in the premises:

IT IS HEREBY ORDERED that the above-referenced advesary proceeding having been amicably resolved, the counter-claim brought by Defendants Robert Soltow and Rosalee Soltow against Debtors Richard L. Fishell and Dorothy M. Fishell shall be dismissed with prejudice and without costs to any party.

__/s/_____
DAVID E. NIMS JR.
U. S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

FOR THE WESTERN DISTRICT OF MICHIGAN

In Re: Chapter 7

RICHARD L. FISHELL AND
DOROTHY M. FISHELL
Debtors Hon David E. Nims Jr.
Case No NG90-85144

ORDER GRANTING TRUSTEE'S MOTION

TO APPROVE SETTLEMENT

At a session of said Court held in the U.S. Bankruptcy Court, for the Western District of Michigan, this 14th day of July 1992.

PRESENT: HON DAVID E. NIMS, JR.
U.S. Bankruptcy Judge

The Trustee's Motion to Approve Settlement, filed June 12, 1992, having come before the court for hearing on July 10, 1992, and the court being familiar with the pleadings and other matters of record appearing in the court's file in this case and in the adversary proceeding which is

the subject matter of the Trustee's Motion, the court having heard argument of counsel, and the court being otherwise fully advised in the premises;

NOW, THEREFORE, for the reasons stated on the record at the hearing, IT IS HEREBY ORDERED that the proposed settlement between the Trustee and Robert and Rosalee Soltow, which is more fully set forth in the Release and Settlement Agreement dated June 12, 1992 between said parties, be and hereby is approved and authorized, nunc pro tunc to the date of the hearing, July 10, 1992.

IT IS FURTHER ORDERED that a copy of this Order be served by ordinary mail upon the following: Gary C. Rogers, Fraser, Trebilcock, Davis & Foster, P. C. 1000 Michigan National Tower, Lansing, MI 48933; Robert and Rosalee Soltow, 13665 Tallman Road, Eagle, MI 48822; Lester N. Turner, Esq., 1005 Timber Pass, Harbor Springs, MI 49740; John A. Porter, Esq., 622 Commerce Building, Grand Rapids,

MI 49503; Richard L. and Dorothy M. Fishell, 13625 Tallman Road, Eagle, MI 48822; and US Trustee, 190 Monroe Avenue, NW, Suite 200, Grand Rapids, MI 49503

_____/s/_____
Hon David E. Nims, Jr.
U. S. Bankruptcy Judge

Return Service Copies to:
Harold E. Nelson, Esq.
500 Calder Plaza Building
250 Monroe Avenue, NW
Grand Rapids, MI 49503

UNITED STATES BANKRUPTCY COURT

WESTERN DISTRICT OF MICHIGAN

In Re:

Richard and Dorothy Fishell

Case No NG90-85144

Debtors

Richard and Dorothy Fishell

Plaintiffs

vs Adv Proc No 91-8015

Robert and Rosalie Soltow

Defendants

Hearing on the Trustee's Motion to Approve Settlement in the above-entitled matter taken on the 10th day of July 1992, at the Federal Building, Grand Rapids, Michigan, before the Honorable David E. Nims, Jr., U. S. Bankruptcy Judge.

APPEARANCES

On Behalf of Plaintiffs:

Lester N. Turner
Attorney at Law
1005 Timber Pass
Harbor Springs, Michigan 49740

On Behalf of Defendants:

Fraser, Trebilcock, Davis & Foster
Attorneys at Law
By: Mark A. Bush
By: Gary C. Rogers
1000 Michigan National Tower
Lansing, Michigan 48933

On Behalf of the U. S. Trustee

Clary, Nantz, Wood, Hoffius, Rankin and Cooper
Attorneys at Law
By: Harold E. Nelson
500 Calder Plaza
Grand Rapids, Michigan 49503

Also Present:

John A. Porter, Trustee
622 Commerce Building
Grand Rapids, Michigan 49503

Robert Soltow

July 10, 1992

* * *

The Clerk: Richard and Dorothy Fishell

The Court: This case is before the court for a hearing on the trustee's motion for the approval of proposed settlement between the trustee and Robert Soltow and Rosalie Soltow. The record may indicate the appearance of Mr Harold E Nelson representing the trustee. We have mr Mark A Bush the attorney for the Soltows, and is Mr Roger Fishell here?

Mr Turner: He's not here to argue today, Your Honor.

The Court: Pardon?

Mr Turner: He's not here to argue today, no.

The Court: Is there anyone--

Mr Turner: I'm appearing.

The Court: Is Richard L. Fishell present?

Mr Turner: My name is Lester N. Turner. I'm appearing on behalf of the Fishells, Your

Honor.

The Court: Oh, Roger Fishell, apparently, signed as attorney in the filing of an objection. So, Mr Turner, you are representing the Fishells now?

Mr Turner: I'm here representing them

today for the purposes of arguing this motion, Your Honor.

The Court: You're here representing them?

Mr Turner: Yes, that's correct.

The Court: Okay, Mr Turner. Are there any other appearances? Apprently not. Mr. Nelson.

Mr Nelson: Thank you, Your Honor. As a preliminary matter, I should point out to the court--

The Court: By the way, can this matter be disposed of within an hour?

Mr Nelson: Certainly my portion of it can, Your Honor. I can't speak for the other counsel.

The Court: Mr Bush.

Mr Bush: Certainly, Your Honor.

The Court: Mr Turner.

Mr Turner: Depends on how much they--time they take, Your Honor, but I would think we can do it within an hour.

The Court: I'm going to have to spread it out. Now, how many do we have to hear? Three?

Mr Nelson: I believe so, Your Honor.

The Court: It will be 20 minutes a piece.

Mr Turner: Actually, we have two from one side, Your Honor, and one from the other, so I presume they can split their 30 minutes, and I can have my (p. 5) 30 minutes?

The Court: Each of you have 20 minutes.

Mr Turner: Okay.

The Court: All right. Mr Nelson.

Mr Nelson: Thank you, Your Honor. As a preliminary matter, I should point out to the Court that the underlying release and settlement agreement entered into between

the trustee and the Soltows, which is before the court for approval today, had a couple of legal descriptions attached to it as Exhibit A and Exhibit B. It's come to the parties' attention that Exhibit A and Exhibit B, when they were attached to the agreement, were, in fact, reversed, and the parties understand that and agree that that, in fact, for purposes of accepting the release and settlement agreement, those exhibits will be, in fact, reversed. And I don't think that presents a problem for the court here today.

Your Honor, with respect to the motion to approve the settlement under Bankruptcy Rule 9019, I would like to state that both the trustee, in his own right and through our office as his counsel, has spent a great deal of time and effort investigating the background and the merits of both the claim and the counterclaim that are pending with reference to the (p. 6)

adversary proceeding that we're trying to settle here today. That adversary proceeding, I think, was commenced originally in the State Court, was--when the Fishells filed for Chapter 11, was removed to this Court and was prosecuted and defended by the various parties during the Chapter 11 phase of this case, which lasted for a little over a year, the case having converted to Chapter 7 several months ago.

Based on that relatively exhaustive investigation, the trustee has determined that this settlement is in the best interest of the creditors and bases that determination on the fact that there is a significant litigation risk from the estate's perspective in pursuing the adversary proceeding. This--I believe, that the court is relatively aware of the facts of the adversary proceeding litigation, and there are complicated facts, and also fairly complicated legal

issues are raised.

Your Honor, just reading the various briefs that had been filed during the course of this adversary proceeding consumed many hours. As the Court may appreciate, those briefs are voluminous. That alone indicates the complexity of the factual and legal issues.

Our belief is this Court has denied motions (p.7) for summary judgment brought by the parties, which also indicates that there are certainly disputed issues of fact that have to be resolved here. It's difficult to assess, with any degree of precision, the exact litigation risk, because the case is so factually intensive. It ultimately depends on which set of witnesses the tryer of fact ultimately believes.

However, if the estate were unsuccessful in pursuing this litigation, a very large claim by the Soltows would end up

being--would result against the estate, and it's quite possible that the bulk of that claim would be administrative in nature, because of the fact that the slander of title counterclaim that the Soltows have brought, many of the time--much of the time, when that title was allegedly slandered, occurred while the Debtors were official possessors in the Chapter 11. In the risk of additional litigation, the trustee has taken into account the inevitable delay in litigation. Although the adversary proceeding, I believe, is scheduled for trial in August, I think this court has observed on the record in the past in this case that an appeal is virtually certain. In fact, I think there's been one or more appeals in connection with this adversary proceeding already. So we would be measuring the time frame for resolving this case (p.8) probably in years, rather

than months or weeks.

The cost of the litigation is another factor that the trustee relies on. This is clearly going to be a hotly contested adversary proceeding, and as I mentioned before, both the legal and factual issues are very complicated and numerous. It will be a very expensive lawsuit to try, win, lose or draw.

Another factor that the trustee is taking into account, as he is required to take into account as the standards that have been developed by the courts under the Rule 9019, is the paramount interest of the creditors of the estate. The posture of this case is such, Your Honor, that the claim on file against the estate by the Soltows will be completely eliminated by this settlement. That represents the single largest claim against the estate, Your Honor. The other assets of the estate, outside the adversary proceedings, should

be sufficient, once we eliminate the Soltows' claim, to return a substantial dividend to the remainder of the creditors. And not having to go through the time consuming process and cross-legged process of litigating the adversary proceeding, that substantial dividends should be able to be returned to the creditors relatively promptly, and, Your Honor, for all of those reasons, the trustee asks that the(p.9) settlement be approved.

The Court: You only used up five minutes of your time. All right. Mr Bush, can you do as well?

Mr Bush: Thank you, Your Honor. For the record, Mark Bush on behalf of Robert and Rosalie Soltow. Mr Soltow's in the court with us today. Bankruptcy Counsel Gary Rogers is also with me today. I'm trial counsel on the adversary proceeding.

Your Honor, my perspective on this matter is, having lived with this case longer than

anyone else has, since April of 1989 when it was filed, we strongly support the position taken by the trustee in this matter, both as defendants in the adversary proceeding and, as indicated, the largest creditor.

We should point out that the settlement arrangement has an important contingency, and that contingency is that it is subject to approval today by the court. In other words, if the court were not to approve the settlement today, there is no agreement for this settlement to otherwise proceed. One of the reasons for that, Your Honor, is we are faced with an August trial date which is going to require substantial preparation, and we need to get a determination from the trustee and the court--

The Court: How many days are set for the(p.10) trial?

Mr Bush: Well, I believe, approximately a week, give or take a few days.

The Court: One week.

Mr Bush: So it's very important that we get a resolution today, if possible. The trustee has studied this matter through counsel extensively, like he has indicated. Counsel has taken copious information from our side of the case and, I presume, from the other side of the case, as well. So it's a very knowledgeable type of decision that the trustee and counsel has made.

I'd like to make five principle points in terms of why, from the standpoint of Mr Soltow, and for everybody else for that matter, the settlement is a good idea for the estate, for the creditors and for all concerned.

The first was alluded to briefly, and that is additional delay that would be engendered by allowing the litigation to proceed. As I've indicated, this case has been around since April of 1989. It has been before three different judges, Judges Eve-

land, Stevenson, and Your Honor. We've had hearings in four different courtrooms in Charlotte, Hastings, Lansing and Grand Rapids. It was scheduled for trial, the(pll) court may recall, originally last August. We now have a trial date of this August. If, for some reason, the case continued and couldn't be tried at that time, I presume, given the court's retirement, Your Honor's retirement, we would have a fourth judge in this case.

This piece of property has been tied up now for over three years, and no one has been able to do anything useful with it. This case has had more adjournments than any case I've ever handled. It seems like anytime we get to a depositive point in the case, someone wants an adjournment.

We believe that if the case were continued, these delays would go on. There certainly would be an appeal. There have already been appeals all the way through the

Michigan State decision, on a decision made by Judge Eveland. There's been an appeal on the Federal System on a Court's decision that a jury trial may, as been requested by the debtor, would not be improper, and we just think that that pattern would continue for years and years and years, based upon the attitude of the parties and the attorneys who have handled it. We don't think that's in anyone's best interest to string this case out to 1993, 1994, 1995. We believe that the delay, alone, which would prevent the administration of the estate, is reason enough for the Court to approve (p.12) the settlement, apart from everything else that's been mentioned.

Reason number two, Your Honor, the estate. The expense in litigating this case for everyone has been overwhelming. No doubt they would continue. The largest single expense would be the trial, and preparation for the

trial, by both sides, and the appeal. That could run into six figures for the estate, for everyone else. We think that given the circumstances presented, the expense, alone, for the litigation to continue, and the burden that that would place upon the creditors in the estate is sufficient reason alone for the court to approve this particular settlement.

The third reason, Your Honor, is the exposure which the case presents to the court--I'm sorry, to the estate and to the creditors. In State court, we filed, at the time that the lis pendens was filed in the property, a counterclaim for slander of title. The court, using the court's own language from an earlier hearing in this case, has recognized, and I quote the Court, "And this is the matter that has been mentioned by counsel for Mr Soltow that has been holding up any disposition of any property and is probably causing

very much damages to Mr Soltow and--(p13) if he prevails eventually, and will mean a lot of expenses and a large claim to be decided in this case." That's from the hearing of January 31 of this year, which is absolutely true. Should Mr Soltow prevail in the adversary proceeding, he intends to vigorously and fully prosecute that slander of title claim.

This piece of property has been dormant, as I've indicated, for over three years. It will remain dormant until the case is tried, if it needs to be tried. He's lost any opportunity to develop it for three years. He's lost any opportunity to use it himself. No one will touch this piece of property as long as this adversary proceeding continues. His legal expenses have been enormous, and we can guarantee the court that that slander of title counterclaim would not only be in the six-figure range, probably would be over a half-of-a-

million dollars worth of exposure to the estate. We don't think it's necesssary that the estate bears that risk and that exposure if the case can be resolved in terms that the trustee and we believe to be reasonable and favorable, and that's what we're presenting to the court today.

The fourth reason, Your Honor, is that the settlement which has been proposed requires a cash payment by Mr Soltow to the estate in the amount of (p.14) $2,000. Now, in a case of this magnitude, that may not strike the court as enormous. However, Mr Soltow feels very strongly that given the lack of merit in the primary case presented against him, that, in fact, constitutes quite a fair amount of consideration for a claim that we believe is as specious as it is. We believe that that amount of consideration, alone, would warrant the trustee recommending approval to the court.

Definitely, Your Honor, it's important for all of us to remember that even if the Fishells were somehow to prevail in the adversary proceeding, which we think is fairly unlikely, this would mean that Mr Soltow would still have to have a mortgage on this piece of property. There has been some dispute and debate in terms of how much that mortgage would be, and it would depend on how the interest is calculated.

The mortgage specifically reserves attorneys fees and collection costs. We believe that if the Fishells were to prevail in this matter, the amount of the mortgage would be over $1 million. We think it's highly questionable whether the value of that property in today's depressed real estate market would exceed that, it at all, and possibly would not exceed that number. We think that this is a very important factor to take into account. In other words, (p 15) the case could be fully

litigated, and there would still be no benefit to the Fishells.

Finally, Your Honor, we do have a question of standing, and I've pointed this out in my brief in support of the motion. The case law has indicated it's highly questonable whether, in circumstances such as this, the debtors even have standing to question the wisdom of the trustee, who has exclusive control and authority over the course of the adversary proceeding, and standing to object to a motion of this type. The case law is not totally clear, but it seems to depend upon whether the debtor is insolvent.

So, we think, for all the foregoing reasons, the settlement is very appropriate, and should be approved today. To the extent the other side would even have standing, that being the debtors, to object, there's been no formal objection filed. There has been an objection filed to Mr Soltow's

claim, which has been noticed on for a week or two from now. We think that the court's ruling today will moot that objection, and we can get this case wrapped up and get this estate administered properly. Thank you very much, Your Honor.

The Court: Okay. Mr Turner.

Mr Turner: Your Honor, on behalf of the (p16) Fishells, I might want to point out to the court that Mr Fishell is not here today because he had unscheduled surgery on Tuesday, and I guess to show the proper attitude of counsel on the other side, we've requested to adjourn this until Mr Fishell is out of the hospital, and that was refused. And the reason given for the refusal was there was a drop dead date on the settlement as of today. I can appreciate Mr Soltow's attorneys wanting a drop dead date as of today, because the court has set the objection of their claim for July 22nd, and I would assume they want to

try to avoid that project, not because of the time, but because of the likely result.

I think that it appears from both previous counsel that the real guts to this thing as to why they want this settlement approved is because of this horrendously large claim that they're going to have in their counterclaim for slander of title. It's interesting that neither counsel have cited any case authority to support this great recommendation as made to the court on settling this alleged counterclaim.

I think if the trustee in bankruptcy was concerned with this counterclaim, he should have brought a motion for summary disposition, and maybe he would have been relieved of any fears that he had (p 17) concerning the counterclaim.

I think that two things are evident. One is that the law, generally, in the United States is that filing a lis pendens privilege so you can't slander the

title. Michigan has not looked at that issue in that light at this time. Michigan does have some case, though, that are very interesting on that issue. One of them is Kauffman v Shefman, which is 169 Mich Appeal 829, which is a 1988 case, where there was a malicious prosecution claimed because a lis pendens was filed. The court held that an action could not be maintained for malicious prosecution by the filing of a lis pendens, and the court went on to say, "Notice of lis pendens serves an important public purpose by protecting the right to litigation involving real property and protecting prospective purchasers by apprising them of disputes regarding rights in the land. These policies should not be thwarted while allowing the filing of a notice of lis pendens by an ultimately unsuccessful litigant to constitute grounds for a malicious prosecution action. Such a result would be contrary to the policy announced by our

Supreme Court in Friedman: to refrain from intimidating those seeking to adjudicate their claims in the courts. Accordingly, we hold that the filing of a (p. 18) notice of lis pendens in this case is not equivalent to a seizure of property for purposes of a malicious prosection claim." And it's not like filing a claim.

And the only case that I could see that counsel may glean some hope from is the Sullvan case, which is an 88 Michigan Appeal case 77, where they said that the--that filing the claim could be grounds for slander of title. The filing of a claim, not notice of lis pendens. Notice of lis pendens is going to be privileged filing of a claim. But even in a filing of a claim situation, it's incumbent upon the person claiming slander of title to show maliciousness and intent, and the court requires a true showing of maliciousness, not just the filing of--the filing of an improper

document is not maliciousness, and it's--

I think this court has sat through enough hearings on this case. We had a very substantial motion for summary disposition, as did defendants, and this court was not able to grant motions for summary dispositions on either side. I think in coming to that conclusion, the court has to recognize that Mr Fishell's claim against Mr Soltow is a legitimate claim, and if Mr Fishell's claim against Mr Soltow is a legitimate claim, whether he's successful or not, (p 19) that vitiates any possible claim that his lis pendens was filed maliciously, or with the intention of due harm to Mr Soltow, rather than the purpose of lis pendens, to put everybody on notice that he is claiming and interest in this property.

So I think that if the court--and we have a memorandum that we'll submit to the court today on just that issue, not

the issue of the counterclaim, because the counterclaim we've always looked at as hot air. There's no question under Michigan law that you're allowed to file a lis pendens, and Mr Fishell properly filed a lis pendens, and the counterclaim is an intimidation or scare tactic. We never filed a motion. At least I didn't. There was a motion filed for summary judgment counterclaim in Circuit Court before I was in it. We didn't pursue it. In all honesty, we didn't care if they tried to bring that up in a trial. Particularly, if this court remembers, we've claimed all along, until you and Judge Gibson wrote to the contrary, that we were entitled to a jury trial, and we would have--

The Court: We didn't hold that, the State Supreme Court did--not the Supreme Court. The Sixth Circuit Court of Appeals did.

Mr Turner: Not in my case. In my case you (p. 20) and Judge Gibson did, but once

it was ruled that we were not entitled to a jury trial, up to that point, we were anxious to see counsel and Mr Soltow try to manufacture or try to persuade a jury that there was a slander of title issue in the matter.

We think that we have made their credibility on the main suit even less likely, and let's get to the main suit, because I think the court ought to look at that for just a moment, too.

Counsel talks about--counsel for the trustee talks about these evaluations that they have made concerning their recommendation to this court. And my recollection is the first one that he pointed out was that there are very voluminous factual and legal issues that will be hotly contested. That may be the case, but I think that there are some very significant issues, factual and legal, that this court has to recognize are definitely in Mr Fishell's favor, some

that are not testimony, some that are just documents that we have offered in support--that we had offered in support of our motion for summary disposition.

There is no dispute that the dollars owed to Mr Soltow originally started out as a mortgage, no question about that. So I think that gives rise to the (p. 21) legal theory that we have about equitable mortgage, once there was a deed that taken out of escrow and filed.

There is no doubt about the fact that Mr Soltow has exhibited an interest in owning this property and not just getting his money back. He's so testified in his deposition that he decided that once Mr Fishell signed the documents on August the 25th, 1988 that gave rise to the present litigation. There is no question that Mr Soltow, within six days after he loaned Mr Fishell the last $55,000 to complete making his property marketable

commenced the wheels to demand payment from Mr Fishell in all the millions that he had signed to Mr Soltow. There is no question that that very note, that Mr Soltow was usurious. That's why counsel--

The Court: Mr Soltow did what?

Mr Turner: Every promissory note that Mr Fishell signed of indebtedness to Mr Soltow had usurious interest rates, and we've given the court all the documentation on that. They haven't--there's no documents-- they haven't denied it was usurious, and I think that's why counsel hedges when he says that one of the-- one of the things involved in this is what value, or the amount of money that Mr Fishell would (p 22) eventually owe to Mr Soltow if Mr Soltow would be successful in this adversary proceeding, and he has a hard time putting a handle on it. I can understand because there's been about $450,000 in principal, and,

of course, it's our position that there is no interest, because it was all usurious, and if you take away the usurious interest--and I don't believe that there's any way that counsel is going to be able to collect any attorney's fees on a case that the court determines was equitable mortgage, or was brought about by fraud. So Mr Fishell looks at owing Mr Soltow $450,000, not a million dollars.

The record shows that when this litigation was commenced, the property was worth a million three, and Mr Soltow had some exhibit that we got in a deposition that shows he put the value at a million five, and so we're probably talking about property that's worth, at least, a million five, and there's indebtedness of about $450,000. I can understand why Mr Soltow would like to

buy it for only another $2,000.

And don't let counsel for Mr Soltow kid you. Mr Soltow desperately wants this property. I think the depositions we've taken shows that he wants this property. I think his conduct before this court (P 23) shows that he desparately wants this property. If this court recalls, there was the Andre property which is adjacent to this property, and Mr Soltow was attempting to buy both of them from Mr Fishell, and Mr Fishell wouldn't do it, so counsel and Mr Soltow came up with the documents that led to this litigation.

When Mr Fishell filed Chapter 11, this court removed its injunctive order on the Andre property, and it went through foreclosure. Now, who bought it at foreclosure? Mr Soltow.

When Mr Fishell sold his right of redemption to a third party, and they redeemed

the property timely, who came to this court to try to have this transaction set aside? Mr Soltow.

Mr Soltow knows, as Mr Fishell, the values of both these properties. Mr Soltow would like to get this property that's involved in this litigation for the $450,000 that he's paid, plus another $2,000. I think $2,000 to settle this case is ludicrous. I think that all that he's doing is this property at a bargain sale.

I think that there is no exposure to the estate and to the creditors, because the counterclaim is useless. I think if the court waited until it resolves that issue on the objection of the (p 24) counterclaim, that will be very abundant to the court.

I think that the court has--I'll get back to Mr Nelson's list. Litigation risk was the first one. What the court has seen

the motions for summary judgment, the court couldn't grant any. Obviously, I feel that the defense has no merit. We've been pursuing this litigation for almost three years now. Mr Fishell spent a lot of time and effort, as have I, and I don't think we would do it unless we thought that they were--

We expected to get at least partial summary judgments granted on our motion for summary judgment on usury or, at least, on fraud or innocent misrepresentation. And I think the court ought to recall, when its going through this mental analysis, that there's very strong evidence of misconduct and misrepresentation by the Fraser firm and their dealings with Mr Soltow and Mr Fishell in this matter. And, of course, the court knows that there is presently a malpractice case pending by Mr Fishell against the Fraser firm, and the trustee has not decided how it's

going to proceed with that particular asset of the estate.

But litigation risk, there is always risk in litigation. I guess, I don't think there's, what I (p 25) call, any substantial risk or real risk in the counterclaim by the Soltows. I don't think any large claims could possibly result against the estate, because of this counterclaim.

I don't know what inevitable delay is. If that--if Mr Bush is telling us that if we're successful in the trial in August, we're going to appeal it, I don't think that's any justification for giving away the claim.

Cost of litigation. This is, this is almost humerous, if it wasn't so serious. When the trustee was considering pursuing this lawsuit, I advised him that I thought that Mr Fishell had really taken the abuse from the Fraser firm and Mr Soltow, and that I had worked without receiving pay-

ment for my time up to that point, other than just keeping track of it, an I would continue to do so through the trial of this issue, if that was going to be a concern to the trustee, that he had to pay attorney fees to pursue this claim, because I felt very strongly about the claim.

Evidently, that trustee has decided that he's got a greater cost risk, because he's decided he'd rather get something than represent Mr Fishell. In the past, I think, that along that line, Mr Bush made (p 26) the comment that the trustee had copious meetings with Mr Soltow in coming to this settlement, in reaching this--a conclusion, and assumed the trustee had done the same with Fishell.

I want the court to understand that isn't true. We had one meeting with Mr--I'm sorry, with the trustee, not the attorney, with the trustee, who--one time, right after he became the trustee. We gave him copies

of the brief and appendix that we filed in our motion for summary disposition. We solicited additonal meetings, we were refused. We particularly solicited additional meetings when we knew that they were meeting with Soltow and his attorney. We were refused. I don't know what copious work has been done to evaluate this from Mr Fishell's side, other than reading our brief in support of our motion for summary disposition and our exhibits, which are attached to it.

I think it's really unfortunate that Mr Fishell sought the protection of the bankruptcy court, as counsel for the trustee pointed out, to see if we can wipe out the Soltow claim. There's sufficient money to give substantial payments to all the creditors.

I don't doubt that when Mr Fishell filed (p 27) for protection in this court, it was the cash flow situation that was the real problem, and the fact that the Andre

property was going to be sold at foreclosure, and the only business assets that Mr Fishell, that he was using in the business fashion, were the Soltow property litigation and the Andre property litigation. He had a home and a farm free and clear of this, probably worth a couple hundred thousand dollars, and he had a condo in Florida that was probably worth a couple hundred thousand.

Immediately upon being in Chapter 11, this court came to the conclusion that there was no equity in the Andre property and released that to proceed to foreclosure, so Mr Fishell was out of luck as far as that property was concerned in getting any plan organized to develop that property and make any money off that property. Then the trustee, the federal trustee, moved to have this, with the assistance of Mr Soltow and his attorneys, moved to have this matter converted to a

Chapter 7. To avoid that, Mr Fishell tried to get this court to let him keep it in Chapter 11, either borrow or sell the property in Florida, to do something with the Andre property. The court declined that request to borrow money, because the court had determined that there was no equity in the Andre (p 28) property.

The next thing that occurs to Mr Fishell is that he, because the court won't let him borrow against that money, he sells that right of redemption for $1.00. The next thing this trustee, the new trustee, then does for him is he files a complaint before this court denying him a discharge in bankruptcy, because he has sold this valuable, according to this court valueless, right of redemption for a dollar.

So everything that has come up since Mr Fishell has filed for protection of this bankruptcy court has buried him a little

deeper. If they do this, if they get rid of this asset that's worth a million-and-a-half for indebtedness of $450,000, that just buries him a little deeper, I suppose, and it's really frustrating to come to get protection under bankruptcy court and end up having the trustee in bankruptcy sell the property in Florida to pay off creditors and to settle the Soltow litigation, which is the biggest asset that Mr Fishell had, settle that for $2,000.

And I don't know what he's going to do with the malpractice claim against the Fraser firm, and I don't know what he's going to do considering the farm, but it's no wonder that they can repreent to this(p29) court if they dispose of this groundless counterclaim for $2,000, they can make substantial payments to other creditors. I would think so. Mr Fishell, when he filed this petition in bankruptcy, other than ridiculous claim by Mr Soltow that he pro-

bably owed less than $200,000 in indebtedness and had $400,000, so it does not surprise me they can do that.

It does surprise me that they would represent to this court that the counterclaim by Mr Soltow has any merit at all, and they have any fear of any large claim against the estate based upon the counterclaim.

And we would respectfully request that the court, to not approve this settlement, particularly at this time. Let it get on for hearing on the objection to Mr Soltow's claim. Let that be disposed of. Let us go to trial in August and conclude the Soltow matter, probably without any counterclaim, and maybe that gets some of the protection that Mr Fishell came to this court to receive in the first place.

And I would file with this court our memorandum in opposition to the trustee's motion to settle the Soltow adversary pro-

ceeding, and that memorandum just goes to the issue of the counterclaim, Your Honor. (p 30) The court is well aware of the claims and the factual situations and the legal issues involved in the initial adversary suit by Mr Fishell against the Soltows.

The Court: You understand, Mr Turner, that I have not had an opportunity to read this. I have read every one of the other briefs that have been filed timely, but I can't read a brief--how many pages is this, at the time of the trial with all the other cases we have, with all the other people that are in this courtroom that have matters to be heard. There's no way that I can read this brief and hold them up.

Mr Turner: That's why I tried to argue what's in the brief, Your Honor, but, in addition to that, you had an advantage that I haven't had, because I haven't seen any brief that was filed in this

thing, but I have seen a motion.

The Court: Well, I surprised when you were here. I understood that the Fishells were being represented by their son.

Mr Turner: Well, as this court is aware, I've been the attorney--

The court: He did file a brief, and I did read that brief.

Mr Turner: As the court is aware, I've(p 31) been the attorney of record for the Fishells in the adversary proceeding since day one in this-- in the bankruptcy court, and I would assume that if a brief was filed, either by Mr Nelson or by Mr Bush, that a copy of it would have been sent either to Mr Fishell, Richard Fishell or Dorothy Fishell, and/or to Roger Fishell, and I have seen no brief. I've seen a motion. I wondered if they didn't have to file a motion to--brief to support their motion, and I wondered if they would have to take testimony so that we could cross-examine

them as to how they arrived at the conclusion they presented to this court.

The court: Okay. Your time is up now. Mr Nelson, any rebuttal--or I might ask, do you desire to present any evidence?

Mr Nelson: No, we don't desire to present any evidence. I believe that the case law in Rule 9019 indicates that the court can take judicial notice of the matters that are in the court's file, which are voluminous enough, without taking any more of the court's time by presenting evidence which would merely attempt to summarize all that.

The Court: Okay. Mr Bush, did you want to take--put on any evidence?

Mr Bush: No, Your Honor. (p 32)

The Court: Okay. Go ahead, then, Mr Nelson.

Mr Nelson: I'm not going to get into any detailed debate or analysis as to the merits of this case. Mr Turner suggests that the counterclaim is clearly without

merit, and that his--the plaintiff's case in chief appears to be pretty much a sure thing. If that were the case, if we were--if our office were to agree with that, perhaps we wouldn't be here today bringing this motion.

Suffice it to say that I can't be nearly as dogmatic about the merits or lack of merits with respect to the claim--counterclaim as can Mr Turner. We have conducted legal, independent legal research in this. We have reviewed virtually all of the adversary proceeding pleadings, all of the briefs, deposition transcripts, hearing transcripts, court opinions that have been rendered out of the state court and perhaps out of this court, as well. And our conclusion is as we've set forth in our prior argument with respect to the litigation risks.

I would like to address the issue of--that I think was implied by Mr Turner that

our office was meeting extensively with the Soltows and their counsel and not with his. And, quite frankly, I have never met (p 33) with Soltows' counsel. We've had some telephone conversations requesting copies of deposition transcripts, entering into stipulations, essentially freezing the property until we've had a chance to evaluate the claim, and to negotiate the ultimate settlement. I've never met Mr Soltow. And I understand he's in the courtroom today. I wouldn't recognize him, because I've never met him.

I did take an opportunity to examine Mr Fishell, Richard Fishell, in this-- in this courtroom in an extensive Rule 2004 examination in an effort to try and evaluate the merits of the case from his perspective. So, if anything, I've spent more time with the--looking at the Fishell side of the story than the Soltow side of the story.

It appears to me in summary, however,

Your Honor, that Mr Turner's interest is solely from the debtors' point of view. He's--he indicated that he agreed there would probably be substantial--enough assets for substantial distribution to creditors even with this settlement taking place, but he essentially said that left nothing--or little or nothing for the Fishells. Well, he, too, has to consider all the creditors.

And for the reasons we've already stated, (p 34) and I would emphasize that one of the factors is the paramount interest of the creditors of the estate, and I think it's absolutely clear, and no one has suggested otherwise, that the interests of all the creditors are better served by this settlement, and so we're again asking that the court approve the motion.

The court: Mr Bush, anything further?

Mr Bush: Just very briefly in rebuttal, Your Honor. Your Honor, I think the court

has heard from the attorneys involved in the adversary proceeding perhaps exactly what it expected to hear, and that is that Mr Turner indicated he felt he had a good case. I told you I felt he had a poor case, and I told you I thought we had an excellent counterclaim. And the final analysis, I don't think it's important, particularly, what the attorneys, who were hotly involved in the litigation, think.

What is important is what the independent trustee, who is charged with the legal responsibility to look out for the best interests of all involved in the estate and the creditors, what he thinks. And I think in that regard, the comments made by the attorneys, but notwithstanding the facts, that I think the points I've made have tremendous validity. I think they ought to be looked at in that light. (p 35)

With respect to our counterclaim, we

should point out a couple of things, Your Honor, and that is I haven't had a chance to review this material either, but suffice it to say, our counterclaim for slander of title would be pursued both under Michigan Statute and under Michigan Common Law.

The court: Was the counterclaim filed?

Mr Bush: Yes, Your Honor.

The court: How long ago?

Mr Bush: It was filed at the time of responsive pleading in Eaton County Circuit Court.

The Court: It was filed before you came in-before the bankruptcy took over?

Mr Bush: That's right, Your Honor, and I think this court has recognized in the passage I read from the prior hearing that the Court recognizes that the claim is out there and would be pursued.

I just want to say that the--in terms of the specific nature of the claim, it will be both statutory and common law. Cameron,

which is kind of the gospel on real property in Michigan, indicates that, section 30.18, in discussing the requirement for a slander of title action, that this malice that Mr Turner referred to as a necessary component of the cause of action can be inferred from any wrongful act (p 36) done intentionally without just cause or excuse.

It's been our position throughout this case, Your Honor, that this entire claim has been done without just cause, simply to hold up Mr Soltow from disposing or utilizing this piece of property.

The specific statute which empowers a slander of title cause of action, I think, has been set forth earlier to the court in MCLA 600.2725. So we feel very strongly that is a large claim with significant exposure to the estate.

Finally, Your Honor, with respect to Mr Fishell seeking the protection of the court,

and so on, and being disappointed on how things have gone in bankruptcy court. This court is very familiar with the procedural history about this case. This case was converted to a Chapter 7, and I quote the court's language from the hearing of January 21, "partly the fact that I don't think I can trust Mr Fishell anymore to comply with the law to do the things he's supposed to do." So I think the comments that are made by Mr Turner ought to be looked at in light of what actually has gone on here since they came into bankruptcy court back in November 1990.

We would ask that the motion be approved and granted, and that the trustee be empowered to enter (p 37) into the settlement. The Court: As indicated by counsel, this case has had a long history. The litigation between the Soltows and the Fishells commenced before this case was filed. Voluntary petition and chapter 11 was

filed November 16, 1990. I don't recall now when the State court proceedings was commenced, but that was sometime before that.

This court cannot possibly recall at this time all of the things that have happened in this case that happened before the filing and happened after the filing. My recollection is that there was a dispute between the Soltows and the Fishells having to do with the property in question, that Mr Fishell had not paid on a mortgage which Mr--which the Soltows held.

The mortgage was being foreclosed, was almost at the date of the foreclosure proceedings, when there was some sort of an agreement reached between the parties whereby the-- and I could be wrong on some of these details, but as I recall, there was a proceeding whereby Mr Fishell-- the Fishells executed a warranty deed to the property in question, and Soltows executed

a discharge of the mortgage.

Both of these documents were placed in the hands of an escrow agent, Transamerica Title Company (p 38) comes to mind, but it could be some other company, but, at least, it was a title company. It provided that Mr Fishell would be given further time--or the Fishells would be given further time in which to pay the amount due and owing on the mortgage. If he didn't pay it by that certain time, the escrow agent would turn over the deed in question to the Soltows. If he did pay the mortgage off to the escrow agent, then the discharge of the mortgage would be turned over to the Fishells. The money was not paid, the deed was given to the Soltows, and, of course, the mortgage discharge was not given to the Fishells.

So the Soltows are the titleholders of the property in question due to an agreement, a presumed settlement, between the

parties. The purpose being, as I recall, that the the Soltows would not have to go through the proceedings of foreclosure; and therefore, would give more time to the Fishells to pay up the amount due and owing. I amy be wrong about some of those details, but something like that.

So you do have a situation where you had somewhat of a settlement way back long before this bankruptcy was filed. But courts usually are receptive to settlements, and it is very seldom for courts to set aside a settlement that the parties have entered into (p 39) by themselves. This--and there are many cases to that effect.

Now, one of the problems that, of course, the trustee in this proceeding has, he has a case where there was a settlement, there was a deed, a warranty deed, given to the Soltows, and the Soltows do hold the property, by the warranty deed.

This bankruptcy proceeding was filed, as I say,back in November 1990, and this proceeded under the debtors, as debtors in possession, under chapter 11, from that date until January 13, 1992. So for well over a year, this whole proceeding was under the control of the Fishells. This proceeding that, as I say, was commenced in the Circuit Court, was brought over into this court and became an adversary proceeding in this court.

This court has made every effort that it has been able to make to try to move this case along. We are--Courts are often criticized for delays in cases. This Court has run up against all kinds of frustrations in this proceedings. Every motion that almost is imaginable has been filed, and disposed of.

There was a claim for a jury trial. The court was of the opinion that this case did not require a jury trial, was held. And an

appeal was taken, and (p 40) that appeal took some time before the appeal was decided by the District Judge, Judge Gibson. As I recall, the Sixth circuit held that bankruptcy courts had no jurisdiction to hold a jury trial. So that disposed of that matter.

And we now have the case set, I believe, as indicated by the arguments of counsel, and I wouldn't argue with them, that this case is now set for trial in August, but I'm sure there will be more--if this is not settled, there will be more delays. There will be more applications for adjournments. For some reason or another, the Fishells just don't want this case to come to trial.

This case could have been tried long ago. It was pre-tried, a trial date was set, long, long ago, and--but we couldn't get to the trial. Because of the fact that there was being nothing done in con-

nection with the Chapter 11 case, as I recall, we didn't even have a plan filed, but I could be wrong on that, but, at least, there was no plan ever confirmed, and so we have had those delays.

It is true, I denied a summary judgment. It is true, there is a claim, I think possibly a valid claim, for usurious interest. Whether that was taken into effect in the settlement that was made some time (p 41) ago, that, I don't know, but I'm sure that the trustee has taken that into consideration in making the settlement that he has made and which is brought before the court today.

The court does approve usually settlements. We prefer settlements. The Court--usually, the parties in a proceedings are better able to settle on a reasonable basis than even the court can.

There has been no objection made by any creditor in this case to the proposed set-

tlement. The only objection that is made is from the debtors, themselves. Only the debtors want to go ahead and run up further expenses for this case, which is the-- what the trustee is trying to avoid.

I recognize the fact that the decision of this court in approving of the settlement may lead to another appeal, and, probably, the Fishells will appeal that. I don't know if they have any position to do that, if a debtor can object to an appeal, but they are doing it here, and we haven't objected, and I suppose we can take an appeal on this matter and delay this matter for a much longer time.

But, at least, if an appeal is taken, in that case, we will have to put up a bond, I'm sure, to protect the Soltows from any further expenses they may (p 42) have, and to protect them from any further damages that may be put upon them, because of the fact that here they have this apparently

nice piece of property, but they haven't had any right to do anything with it for all these years that have gone by, and, of course, if an appeal is now taken, there will be even a longer time. So they will have to put up a bond to take care of that so that there will be monies available by some bonding company to take care of that situation.

So because of the facts that I have indicated, the motion, the proposed settlement, is approved by the court, and an order may be entered.

Mr Nelson, would you prepare the order, please?

Mr Nelson: I'll prepare an order, Your Honor, and present it before the end of the day.

The Court: Thank you.

Mr Bush: Thank you, Your Honor.

(Matter concluded)

(P. 43, Certificate of shorthand reporter Lisa C. Dunmore omitted.)

UNITED STATES BANKRUPTCY COURT

FOR THE WESTERN DISTRICT OF MICHIGAN

IN RE

RICHARD L. FISHELL and
DOROTHY M. FISHELL

Debtors

Chapter 7
Hon David E. Nims Jr
Case No NG90-85144

_____/

TRUSTEE'S MOTION TO APPROVE SETTLEMENT

NOW COMES John A. Porter the chapter 7 Trustee ("Trustee") by his attorneys, Clary, Nantz, Wood, Hoffius, Rankin & Cooper, and pursuant to Federal Rule of Bankruptcy Procedure 9019 requests that this court enter an order approving the settlement described in this Motion. In support of this motion the Trustee states:

1. The Debtor's filed a Voluntary Petition under Chapter 11 of the Bankruptcy code on November 16, 1990.

2. On January 13, 1992 this case was

converted to a case under Chapter 7 of the Bankruptcy Code and the Trustee was appointed to serve as the Chapter 7 Trustee.

3. At the time of the conversion of this case an adversary proceeding was pending entitled Richard L. Fishell and Dorothy M. Fishell, plaintiff/counterdefendants v Robert Soltow and Rosalee Soltow, defendant/ counter-plaintiffs, Adversary Proceeding No. 91-8015 (the "Adversary Proceeding"). The Adversary Proceeding was commenced by the Debtors' pre-petition in state court and was ultimately removed to this court following the filing of the Debtor's voluntary Chapter 11 petition.

4. The Adversary Proceeding involves the Debtors' claim of title to certain vacant, but relatively valuable, real property located in Oneida Township, Eaton County Michigan (the "Property"). The Defendants, Robert and Rosalee Soltow (the "Soltows"),

filed the counter claim seeking substantial money damages against the Debtors on a slander of the title theory.

5. The Trustee and his counsel have expended substantial resources in investigating and evaluating the merits of both the claims and the counter-claims raised in the adversary proceeding. Following such investigation and evaluation, the Trustee has determined that it is in the best interest of the estate and all of the creditors that the adversary proceeding be settled as set forth below. The Trustee bases his decision to enter into the proposed settlement upon factors which include, but are not limited to, the following:

A. Avoiding the risk of litigation which includes the risk that a large damage claim could potentially be asserted against the estate depending upon the outcome of the adversary proceeding.

B. Avoiding the delay inherent in the litigation process at both the trial and appellate levels.

C. Avoiding the cost to the estate of litigating the adversary proceeding which would involve numerous and complicated legal and factual issues.

D. Eliminating any claim against the estate by the Soltows who represented the Debtors largest pre-petition creditors.

6. The material terms and conditions of settlement are summarized below. A complete copy of the proposed Release and Settlement Agreement is available for inspection at the office of the Bankruptcy Court Clerk from 8:00 a.m. to 4:30 p.m., Monday through Friday.

A. All claims and counterclaims in the adversary proceeding shall be dismissed with prejudice and without costs and all Lis Pendens filed with respect to the property shall

be terminated and discharged.

B. The Trustee and the Soltow's shall mutually release the other (and, in the case of the Soltows, release the Debtors) from all claims generally, including any pre-petition debt claims which the Soltows could assert against the bankruptcy estate. The only exception to the mutual release is with respect to the Soltows claim of ownership of certain property known as the Andre property which is located adjacent to the Property.

C. The Soltows shall pay the bankruptcy estate the sum of $2,000.

D. The Settlement is subject to bankruptcy court approval and the entry of an order approving the settlement on or before July 10, 1992.

WHEREFORE, the Trustee requests that this court enter an order approving the proposed settlement between the Trustee

and the Soltow's and enter such other and further orders as may be necessary to consummate the settlement.

CLARY, NANTZ, WOOD, HOFFIUS
RANKIN & COOPER
Attorneys for the Trustee

Dated June 12, 1992

By__/s/_____
Harold E. Nelson
P-27974
Business Address &
Telephone:
500 Calder Plaza
250 Monroe Avenue NW
Grand Rapids, MI 49503
(616) 459-9487

(3)
Supreme Court, U.S.
F I L E D
95 30 JUL 3 1995
OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1994

RICHARD L. FISHELL
and
DOROTHY M. FISHELL

Petitioners

vs

ROBERT SOLTOW
and
ROSALEE SOLTOW
and
JOHN A. PORTER, Trustee

Respondents

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

APPENDIX VOLUME II

Lester N. Turner
1005 Timber Pass
Harbor Springs, MI
49740
(616) 526-9222
Counsel for Petitioners

216pp

Release and Settlement Agreement

This Agreement is made this 12th day of June 1992, by and between Robert and Rosalee Soltow, Michigan residents, whose address is 13665 Tallman Road, Eagle, Michigan 48822 (the "Soltows"), and John A. Porter, Trustee of the Estate of Richard L. and Dorothy M. Fishell, Debtors ("Fishells"), Bankruptcy Court Case No 90-85144, whose address is 622 Commerce Building, 5 Lyon Street, N.W., Grand Rapids, Michigan 49503-3122 ("Trustee")("Agreement")

Recitals

A. In 1986, the Fishells borrowed money from the Soltows. The Fishells gave the Soltows a promissory note and mortgage to secure the loan made by the Soltows ("1986 loan"). The real estate described in Exhibit A was given by the Fishells to the Soltows as security for repayment of the loan ("the property").

B. After defaulting on payment of the 1986 loan, the Fishells and the Soltows entered into an amended promissory note, mortgage modification agreement and escrow holding agreement in August 1988 ("1988 loan documents"). The 1988 loan documents superseded the 1986 loan. The loan documents provided that the Soltows would not foreclose immediately but gave the Fishells until February 15, 1989 in which to make payment.

C. The 1988 loan documents required the Fishells to execute and deliver a deed to the property to an escrow agent, Lawyers Title Insurance Corporation. The 1988 loan documents further provided that if the amount owed by the Fishells was not paid on time then the escrow agent was required to release to the Soltows the warranty deed conveying the property to them.

D. The Fishells never paid the Soltows and the escrow agent delivered the warranty

deed in March 1989 to the Soltows, who then recorded the deed to the property on March 16, 1989.

E. On April 27, 1989, the Fishells sued the Soltows in Eaton County Circuit Court, Case No 89-366-CH, seeking to cancel the warranty deed and seeking other relief. The Fishells also filed a lis pendens against the property. The Soltows filed a counterclaim against the Fishells on June 12, 1989 alleging slander of title. This lawsuit is referred to as the "Eaton County Lawsuit".

F. On November 16, 1990 the Fishells filed bankruptcy seeking protection under Chapter 11 of the United States Bankruptcy Code. Initially the Fishells were permitted to stay in possession of their property.

G. On December 12, 1990, the Fishells made application to the Bankruptcy Court to remove the Eaton County Lawsuit to the Federal Bankruptcy Court as part of the

Chapter 11 proceedings. The Bankruptcy Court authorized the removal and the Eaton County Lawsuit became Adversary Proceeding No 91-8015 ("Adversary Proceeding").

H. Upon motion of the United States Trustee and certain creditors, on January 13, 1992, the bankruptcy court, following a hearing on the motions for conversion of the Chapter 11 to Chapter 7, ordered the conversion of the Chapter 11 proceedings to Chapter 7 liquidation. Thereafter, the Trustee was appointed to administer the Chapter 7 proceedings.

I. The Soltows and the Trustee have agreed to settle all disputes arising out of the Eaton County Lawsuit and the Adversary Proceeding (collectively the "Lawsuit") on the terms and conditions contained in this Agreement.

Now, therefore, in consideration of the mutual promises and agreements made in this Agreement and intending to be

legally bound, the parties agree as follows:

1. Approval of Bankruptcy Court. The Trustee and the Soltows agree that this Agreement (except for the provisions of this paragraph 1) shall become effective only if the Bankruptcy Court enters an order approving it on or before the 10th day of July 1992 ("Approval"). Trustee and the Soltows agree to use their best efforts to obtain the Approval as soon as reasonably possible. The Soltows agree not to sell, convey or transfer the Property or any interest in the Property until the entry of the Bankruptcy Court's order approving this Agreement.

2. Dismissal of the Lawsuit. Trustee shall cause the Lawsuit to be dismissed with prejudice and without costs to either party. At the Soltow's request, the Trustee shall promptly cause any other documents they request to be executed in order

to more fully effectuate the dismissal of the Lawsuit and termination of the lis pendens. The order of dismissal shall be substantially in the form of attached Exhibit 1. The Soltows shall cause their counterclaim made in connection with the Lawsuit to be dismissed with prejudice and without costs to either party. The order of dismissal shall be substantially in the form of attached Exhibit 2.

3. Mutual Release and Discharge of Claims. For and in consideration of the provisions of this Agreement, the Soltows release and forever discharge the Trustee and the Fishells, together with, to the extent applicable, their agents, officers, employees, attorneys, affiliated organizations and insurers, from any and all claims, demands, equitable relief, damages, costs, expenses, administrative actions and cause of action of any kind or character which now exists or may later arise which were

known or should have been known by the parties relating in any matter to or arising from or which could have arisen from the Lawsuit, except as provided in the terms of this Agreement. Anything in this Agreement to the contrary notwithstanding, the Soltows are not waving any claim they may have against the Fishells or the Trustee with respect to determination of the Soltows' interest in the real estate legally described in attached Exhibit B (the "Andre property") and in connection with the purchase at foreclosure sale, or the alleged redemption of the Andre property. The Trustee and the Soltows agree that this Agreement shall not act as a bar or waiver of the Soltow's claim of ownership of the Andre property. All other claims against the Trustee and the bankruptcy estate shall be considered released by the Soltows pursuant to this Agreement.

The Trustee forever discharges the Sol-

tows, together with, to the extent applicable, their agents, assigns, officers, employees, attorneys, affiliated organizations and insurers, from any and all claims demands, equitable relief, damages, costs, expenses, administrative actions and cause of action of any kind or character which now exists or may later arise which were known or should have been known by the Fishells or by Trustee, relating in any matter to, or arising from, or which could have arisen from the Lawsuit or related occurrences pertaining to the Property, except as provided in this Agreement.

4. Indemnification. Each party agrees to indemnify the other against any and all cost, loss and expense, including attorneys fees, which may be incurred as a result of defending any additional claim made by the other party arising out of the Lawsuit or any transaction involving the Property except that this indemnification shall not

apply to expenses incurred in connection with any appeal of the Approval of this Agreement.

5. Payment by the Soltows. The Soltows agree to pay the Trustee the sum of $2,000 within 30 days of the date on which the Approval is obtained.

6. Non-Admission of Liability. This Agreement shall not be construed as an admission nor is it an admission by either party or any of their officers, employees, agents or attorneys in any respect for any claim or causes of action which arose out of or could have arisen out of the Lawsuit or out of transactions involving the Property. Each party expressly denies any admission of liability to the other party. This Agreement is being entered into solely for the purpose of resolving and settling any and all of the claims that arose out of or could have arisen out of the Lawsuit or out of any transaction involving the property

in accordance with Paragraph 3.

7. Agreement as Defense. The parties fully understand and agree that this Agreement may be pled as a complete defense in any past, present or future claim of entitlement which has been released by this Agreement.

8. Attorney's Fees. The parties agree that nothing in this Agreement shall be interpreted to render any party liable for payment of the attorney's fees of another party, except as specifically provided in this Agreement.

9. Notices. All notices and other communications required or permitted under this Agreement shall be deemed to have been given if mailed by registered or certified mail, postage prepaid, or otherwise delivered by hand or messenger, to the parties at their addresses listed on page 1, or to such other changed address as such party may have given notice.

10. Applicable Law. This Agreement has

been executed, delivered and accepted at and shall be deemed to have been made in Lansing, Michigan and shall be interpreted and the rights and liabilities of the parties shall be determined in accordance with the laws of the State of Michigan.

11. Integration. This Agreement sets forth the entire agreement and understanding between the parties as to the subject matter hereof, and supersedes all prior discussions, representations, amendments or understandings of every kind and nature between them.

12. Amendments. Any amendment, alteration, supplement, modification or waiver shall be invalid unless it is set forth in writing, signed by the party intending to be bound thereby.

13. Severability. If any provision of this Agreement becomes or is declared by a court of competent jurisdiction to be illegal, unenforceable or void, this Agreement shall

continue in full force and effect without the provisions.

14. Assignability. This Agreement may not be assigned by any party without the prior written consent of the other parties.

15. Benefit. This Agreement shall be binding upon and inure to the benefit of the Soltows, the Fishells and the Trustee and their respective personal representatives, successors and assigns.

16. Captions. Captions contained in this Agreement are inserted for reference and in no way define, limit, extend or describe the Agreement or the intent of any provision herein.

17. Counterpart. This Agreement may be executed in one or more counterparts, each of which shall be enforeceable against the party actually executing such counterparts and all of which together shall constitute one instrument.

18. Pronouns. All pronouns and any vari-

ation thereof shall be deemed to refer to the masculine, feminine, neuter, singular or plural as the identity of the parties may require.

19. Construction of Agreement. The parties agree that this Agreement has been jointly drafted and neither party may assert an ambiguity in the construction of this Agreement against the other party because the other party allegedly drafted the alleged ambiguous provision.

20. Representations, Warranties and Agreements of the Soltows. For the purposes of inducing the Trustee to enter into this Agreement, they warrant that they have authority to enter into the Agreement and, once the Approval is obtained, the Agreement will be binding on them.

21. Representations, Warranties and Agreements of Trustee. For the purpose of inducing the Soltows to enter into this Agreement the Trustee represents that:

a. He is the duly appointed and acting trustee of the Fishells' Chapter 7 bankruptcy.

b. He has the power and sole authority to enter into the Agreement and, once the Approval is obtained, the Agreement will be binding upon him and the Fishells.

c. The Lawsuit is property of the bankruptcy estate and the Trustee, subject to court approval, has exclusive control over its disposition.

22. Voluntary Execution. The parties acknowledge that they have read the Agreement, that they understand its terms, and they have entered into it voluntarily. Further, the parties specifically acknowledge that they have met and conferred with their respective attorneys regarding the terms of the settlement and that their respective attorneys have advised them that this Agreement constitutes final resolution of any and all claims which they may have against one another.

In Witness Whereof, the parties have executed this Agreement on the date stated above.

___/s/_____ __/s/_____

Robert Soltow

John A. Porter, Trustee of the Estate of Richard L and Dorothy M. Fishell, Debtors

___/s/_____

Rosalee Soltow, by her attorney in fact

(Omitted hereafter: Durable Power of Attorney of Rosalee Soltow, 2 legal descriptions of real estate noted in above Agreement, and proposed form of orders referred to as Ex 1 and 2 in above Agreement)

UNITED STATES BANKRUPTCY COURT

WESTERN DISTRICT OF MICHIGAN

IN RE

RICHARD L. FISHELL and
DOROTHY M. FISHELL
Debtors

Case No 90-85144
Hon Jo Ann C.
Stevenson

RICHARD L. FISHELL and
DOROTHY M. FISHELL

Chapter 11

Plaintiffs

vs

Adversary No
91-8015

ROBERT SOLTOW amd
ROSALEE SOLTOW

Defendants

FIRST AMENDED COMPLAINT

Plaintiffs, as debtors in possession, allege:

JURISDICTION

Jurisdiction of this court over this adversary proceeding is based upon 28 USC 1334 and 28 USC 157 in that this action is otherwise related to the Chapter 11,

Title 11 case of Richard L. Fishell and Dorothy M. Fishell, debtors, filed 16 November 1990 and now pending before this Court, File No 90-85144. This is a non-core proceeding under 28 USC 157(c). Plaintiffs do not consent to the entry of final orders or judgments by the bankruptcy court in this action. However, Plaintiffs have filed a demand for jury trial and Plaintiffs would consent to the entry of final orders or judgments by the bankruptcy judge on all matters submitted to a jury. Plaintiffs have been duly appointed as debtors in possession, are qualified to so serve and are presently acting as such.

COUNT I

1. This is an action to cancel or rescind a deed to real property located in Eaton County, Michigan and for other relief.

2. That Plaintiffs are adults and

the grantors pursuant to the Warranty Deed which is the subject matter of this action. Said Warranty Deed, recorded in Liber 792 of Deeds, pages 198-199 on the 16th day of March 1989, is attached hereto as Exhibit "A".

3. That the Defendant, Robert Soltow, is an adult and the grantee under the aforesaid Warranty Deed, Exhibit "A". The Defendant, Rosalee Soltow, is, and was, the wife of the said Robert Soltow, and has, or may have, some interest in the property.

4. That prior to the recordation of the said Warranty Deed, Plaintiffs were the record fee owners of the premises described herein by virtue of a certain warranty deed recorded on the 14th day of July 1986 in Liber 707 of Deeds, page 627. A copy of said warranty deed is attached hereto as Exhibit "B".

5. That on or about the 7th day of

July 1986, Plaintiffs were engaged in the business of developing real property and, as mortgagors, executed and delivered to the Defendant, Robert Soltow, as mortgagee, a mortgage on the above premises, same having been recorded in Liber 707, page 630, Eaton County records.

6. That the amount of the loan from Defendant to Plaintiffs on or about July 7, 1986, that gave rise to the mortage mentioned in paragraph 5, was $350,000 at 15% interest per annum and a default interest rate of 20% per annum.

7. That Defendant Robert Soltow claims that Plaintiff Richard Fishell signed five additional notes, with Defendant, Robert Soltow as payee, from on or about April 23, 1982 through March 24, 1988. Defendant claims those notes were as follows:

a) Noted dated 4/23/82 ($10,625 princi-

pal amount) at 12 1/2 % interest per annum;

b) Note dated 1/29/86 ($6,250 principal amount) at 12 1/2 % interest pre annum;

c) Note date 7/16/87 ($25,000 principal amount) at 12% interest per annum;

d) Note dated 9/3/87 ($25,000 principal amount) at 12% interest per annum;

e) Note dated 3/24/88 ($55,000 principal amount) at 12% interest per annum.

8. That on or about August 25, 1988, Defendant Robert Soltow caused to be prepared the following:

a) an amended promissory note, allegedly combining the principal and interest due on the note of July 7, 1986 for $350,000 and the principal and interest due on the notes set forth in paragraph 7, supra. The total amount set forth in the amended note was in the amount of $610,446.14.

b) a mortgage modification agreement securing a larger principal sum.

c) an escrow holding agreement.

d) a declaration of storm drain easement over adjoining lands for the benefit of the property described in the mortgage and warranty deed at issue herein.

e) the warranty deed (attached hereto as Exhibit "A").

9. In order to induce Plaintiffs to execute the documents set forth in paragraph 8 a- e, Defendants made the following representations to Plaintiffs:

a) On August 12, 1998, Defendants notified Plaintiffs that Plaintiffs were in default on the $350,000 note to Defendant Soltow and under mortgage foreclosure Plaintiffs' redemption period would have expired the end of December, 1988; therefore, Plaintiffs would benefit from signing said documents;

b) That the public or people that Plaintiffs were dealing with on selling or developing the property would not have any notice of the dealings between Plaintiffs and Defen-

dants, other than the mortgage from Plaintiffs to Defendant Robert Soltow which would be recorded;

c) Defendant represented to Plaintiffs that he just wanted his money repaid and there were verbal agreements that Plaintiff, Richard Fishell, would be allowed to treat the property as his own and to sell same without any hinderance from Defendant even after the February 15, 1989 date set forth in the escrow holding agreement.

10. Relying upon those representations, Plaintiffs signed the documents on August 25, 1988, with the understanding said documents were security on the monies owed by Plaintiffs to Defendant Robert Soltow.

11. The representations made by Defendants, as set forth in paragraph 9 a - c were false.

12. That Plaintiffs relied upon said representations in signing the documents on August 25, 1988.

13. That Plaintiffs were deceived by said representations to their detriment in that:

a) Plaintiffs believed that they were gaining additional time to sell and/or develop said property;

b) Plaintiffs believed Defendants would do nothing to hinder Plaintiffs' efforts;

c) Plaintiffs believed that Plaintiffs would be able to continue their efforts without hinderance even after February 15, 1989;

d) Plaintiffs believed Defendants were just taking the deed in escrow as security for the indebtedness;

14. That Plaintiffs were in privity with Defendants in the transactions of August 25, 1988.

15. Further, that the foregoing representations made by Defendants were false and known to be false when made.

16. Defendants did not intend, at the time of making the representations, and do not now intend to perform as agreed, as evidenced by:

a) The Defendant and his agent, from and after 25 August 1988, represented to others dealing with the property, including local government officials, that Plaintiffs need no longer be dealt with respecting same;

b) Defendants could not have foreclosed on the mortgage and had the redemption period expire by December 31, 1998;

c) Defendants caused to be filed on February 7, 1989, an affidavit prepared and signed by Douglas Austin advising the world that by February 15, 1989, Plaintiffs would have no interest in said property;

d) Attempting in April and May of 1989 to have Plaintiffs sign off on any verbal rights that Plaintiffs had to sell and/or develop said property;

e) Defendants took the position, in April and May of 1989, that they owned the property and did not wish to merely be repaid the indebtedness.

17. That contrary to the agreement and understanding of the parties, the aforesaid deed was recorded upon the public records of Eaton County, Michigan on March 15, 1989, and claimed to have vested absolute fee ownership in Defendant, Robert Soltow, at that time.

18. That the Defendant, Robert Soltow, asserts fee ownership of the property and has refused Plaintiffs' demands to either cancel the deed or reconvey.

19. That if the Defendants are allowed to assert title to said property, Plaintiffs will suffer losses which would result in unmerited benefits to Defendants due to said representations by Defendants in that Plaintiffs property was worth in excess of $1,200,000 and Defendant only had a mort-

gage on said property for $350,000. Due to the documents signed on August 25, 1988, Defendants are claiming ownership of said property which results in an unearned benefit of excess of $850,000.

20. Plaintiffs were led to believe by Defendants or their agents that attorney Douglas Austin, a duly licensed attorney (who prepared all documents relevant herein, including the affidavit of 7 February 1989 and the warranty deed at issue, had represented Plaintiffs over a prolonged period in matters related to the real property), had a confidential or fiduciary relationship with Plaintiffs throughout the course of the foregoing events and circumstances.

21. The Plaintiffs' interests, contrary to their belief throughout, were not served either by said attorney or by the documents described herein but were, in fact, frustrated.

22. That, as a result of the foregoing,

Plaintiffs were misled as to all material matters concerning the property and their rights therein and have relied to their detriment upon the conduct and representations of the Defendant and attorney Austin.

23. That, by reason of the foregoing and by reason of the recording of the warranty deed described in paragraph #2 above, Plaintiffs have no effective means of protecting their interests in the property and the Defendant appears now to possess the present ability to transfer or otherwise encumber same.

24. The sole consideration running to Plaintiffs was the agreement of Defendant to allow Plaintiffs to effect a favorable disposition of the property without being hindered in that effort by Defendant through foreclosure or public notice, either by recording or otherwise.

25. That the purpose and intent of the

above agreement was to assure Plaintiffs continued ability to market the property and otherwise fully protect their interests therein and, as a specific inducement to Plaintiffs for the execution of the documents of 25 August 1988, the Defendant had represented and agreed to do nothing to frustrate Plaintiffs' rights.

26. That contary to the foregoing agreement, the Defendant recorded, without cause, notice or necessity, the affidavit of his agent regarding the state of Plaintiffs' interest in the property and the impending forfeiture to the Defendant. As a direct result thereof, Plaintiff could not pursue prospective purchasers who had shown an interest in the property; or pursue others that may be interested in the property. A copy of the agent's affidavit, recorded 7 February 1989, is attached hereto as Exhibit"C".

27. That due to the foregoing the

Plaintiffs were deprived of the benefit of their agreement of 25 August 1988 and that agreement has entirely failed of its consideration.

28. That the interest charged by Defendant to Plaintiff on the six notes set forth in paragraphs 6 and 7, supra, were at illegal rates and were usurious.

29. That in combining the six notes into one note by adding together the principal due and the usurious interest a new usurious note in the amount of $610,446.14 was created.

30. That the amounts claimed tobe owed on said note of August 25, 1988, by Defendant, from time to time to pay off said indebtedness and have the warranty deed and other documents of August 25, 1988 nullified, included usurious interest demands.

31. That, even if the figure of $610,446.14 had been a correct amount,

it was inadequate consideration to allow a transfer of the property in question from Plaintiffs to Defendant, because the property was worth in excess of one million two hundred thousand ($1,200,000) dollars.

32. That, as a result, Plaintiffs suffer from immediate and irreparable harm for which there is no adequate remedy at law.

33. That Plaintiffs have offered to do equity and have requested Defendant do the same, however Defendant has refused.

34. That the execution and delivery of the aforesaid documents executed by Plaintiffs on the 25th day of August, 1988, were without lawful consideration as no legal benefit flowed to Plaintiffs and no legal detriment flowed to Defendants as a result of such execution and delivery.

35. That, as a result, no enforceable transaction was consumated between the

parties and same is therefore void.

WHEREFORE, the Plaintiffs demand that

1. The defendant be immediately enjoined and restrained from conveying or encumbering the real property described in the documents at issue herein;

2. The warranty deed described in paragraph #2 above and attendant documents be cancelled of record;

3. Cancel all interest because same was usurious, Determine Plaintiffs' indebtedness on the mortgage to be $350,000, less whatever damages this Court may assess against Defendants under Count IV of this complaint.

4. The Court grant such othe relief as is appropriate.

COUNT II

36. That this is an action for the imposition of a constructive trust upon real property located in Eaton County, Michigan and for other relief.

37. Plaintiffs reallege paragraphs 2-35 of Count I.

38. That, in accordance with the above agreement of the parties, the deed from Plaintiffs to Defendant, Robert Soltow, was intended to operate merely as security for the indebtedness and not as an absolute conveyance of Plaintiffs' interest in the property.

39. That Plaintiffs have not, at any time, relinquished any right in the property, whether it be the right to possession, redemption or reconveyance and Plaintiffs have not, at any time, recognized the Defendant, Robert Soltow, as owner of the property.

40. That the entire agreement of the parties, as aforesaid, has never been memorialized in writing contrary to the agreement and expectation of the parties.

41. That Plaintiffs had, and still have, substantial equity in the property and

have never relinquished or transferred same.

42. That, since the recording of the deed on 16 March 1989, the Defendant has made unauthorized entry upon the property and purports to have the lawful right to convey, improve or occupy the property as his own, to all of which Plaintiffs have objected.

43. That, the foregoing, whether the product of fraud or mistake, has deprived Plaintiffs of their rights in the property and has unjustly enriched the Defendant Robert Soltow.

WHEREFORE, Plaintiffs pray the Court:

1. To declare Plaintiffs' right in the premises.

2. To declare that the Defendant holds same as trustee for Plaintiffs.

3. That the deed be construed as a mortgage.

4. That the court direct the Defendant,

Robert Soltow, to reconvey to Plaintiffs or in the alternative that the court enter such judgment as will operate as the reconveyance.

5. That the court determine the amount owed on said mortgage is $350,000.

6. That the court grant such other relief as is appropriate.

COUNT III

44. That this is an action for a declaratory judgment.

45. That Plaintiffs reallege paragraphs 2-35 of count I.

46. That the execution and delivery of the documents described herein had the effect, and were intended by the parties at the time to have the effect, of creating additional security for Defendant, Robert Soltow, and were made and given, and agreed to be made and given, and accepted for no other or further purpose.

47. That contrary to the intent and agreement of the parties, the documents now of record and writings attendant thereto, without more, may tend to establish the deed, Exhibit A, as an absolute conveyance of Plaintiffs' interest and the Defendant, Robert Soltow, now appears to so assert.

48. That Plaintiffs allege that said deed was intended to be treated and should be treated and held to be in the nature of a mortgage and not an absolute conveyance of Plaintiffs' interest.

49. That Plaintiffs are in doubt as to their rights in the property described in the deed and Plaintiffs' position in this regard is presently controverted by the Defendant, Robert Soltow, since Defendant appears to assert ownership of the fee without condition.

50. That the following facts would support Plaintiffs' contention as to

the intent and effect of the above described documents of the 25th day of August 1988:

A. The Plaintiffs believed, and were led to believe by Defendant, Robert Soltow, and attorney Douglas J. Austin, that no acts or neglect on the part of the Defendant, Robert Soltow would interfere with or hinder Plaintiffs in their continued efforts to market the property; however same was untrue as the Defendant, Robert Soltow, by his apparent agent, has by specific act(s) impaired Plaintiffs' ability by, among other things, recording the affidavit of 7th day of February 1989 upon the public records.

B. The Plaintiffs believed, and were led to believe by the Defendant, Robert Soltow, and attorney, Douglas J. Austin, that Plaintiffs retained the right to redeem the property following the event

of any recording of the deed, however, same was untrue as Defendant, Robert Soltow, now asserts in this context that he is the owner of the property and that the mortgage debt has been extinguished and the Plaintiffs have no subsisting rights with respect to the property.

C. That although Defendant, Robert Soltow, asserts absolute ownership and extinguishment of the debt, the mortgage has not been discharged nor has the note or amended note been cancelled or returned to Plaintiffs and some remain in Defendant Robert Soltow's possession.

D. There was no consideration for the execution of the documents of 25th day of August 1988, including the deed, and the result of the execution of same has been to deprive Plaintiffs of the protection accorded by the prior mortgage, while those same documents of 25th day of August 1988, granted to the Defendant,

Robert Soltow, the advantage of a greater secured debt, and earlier mortgage due date, and rights in adjacent property, not available under the original mortgage.

E. That, as all parties well knew, the Defendant, Robert Soltow, had made an attempt, prior to 25th day of August 1988, to purchase the subject property from Plaintiffs and had been denied, and the Defendant, Robert Soltow, well knew of its fair market value, and that the fair market value greatly exceeded the sums due under the mortgage and amended mortgage.

F. That the Defendant, Robert Soltow, and attorney, Douglas J. Austin, had made, on the 25th day of August 1988, an thereafter, verbal assurances to Plaintiffs that the Defendant, Robert Soltow, no longer desired to own the property, that Defendant, Robert Soltow, could not obtain title without observing Plaintiffs' redemption rights, that such rights were pre-

served, that no interference with Plaintiffs' efforts to market the property would be committed by Defendant, Robert Soltow, that Defendant, Robert Soltow, would cooperate whenever Plaintiffs could arrange any sale or conveyance and that no further written agreements, other than as set forth in the documents of the 25th day of August 1988 were necessary for anyone's protection.

G. That Defendant, Robert Soltow, knew on the 25th day of August 1988, and at all times thereafter, that Plaintiffs had no intention to execute an absolute conveyance of the property, and that Plaintiffs did not believe, at any time, that they had done so, but Plaintiffs merely sought and intended some refinancing arrangement.

H. That attorney Douglas J. Austin had prepared all of the documents of the 25th day of August 1988, the exact form, content and extent of which had not been

requested by Plaintiffs.

I. That attorney Douglas J. Austin supervised the execution of the documents of the 25th day of August 1988 and was the only attorney present or participating in same.

J. That the Defendant, Robert Soltow, and attorney Douglas J. Austin, well knew at the time of the execution of the documents on the 25th day of August 1988, that Plaintiffs believed that attorney Douglas J. Austin was acting as Plaintiffs' attorney, that their rights in the property were being protected and observed by those documents, and by his conduct, yet the attorney, Douglas J. Austin did not, at that time, or at any time indicate or suggest to Plaintiffs that other counsel should be obtained by them.

51. That Plaintiffs assert that the documents operated only as further security for Defendant, Robert Soltow, and

that their right of redemption exists.

52. That the Defendant, Robert Soltow, apparently asserts that the conveyance was absolute and that Plaintiffs' rights in the property have terminated.

53. That the entire transaction is without consideration and if sustained, will result only in the unjust enrichment of the Defendant, Robert Soltow, at Plaintiffs' expense.

54. That as a result of the foregoing scheme or design, effectuated through misrepresentation, Plaintiffs have been damaged and suffer a forfeiture in the absence of the relief herein requested.

55. That Plaintiffs have offered, and hereby offer, to do equity.

WHEREFORE, Plaintiffs pray the Court:

a) to declare the rights of the parties under the above transaction;

b) that the deed be declared and held to be a mortgage;

c) that the amount due and owing on the note and mortgage be $350,000;

d) that Plaintiffs be permitted to have six months before the said note and mortgage are due;

e) if it becomes necessary for Defendant to foreclose on said note and mortgage that Plaintiff be permitted to redeem according to law;

f) that the court grant Plaintiffs whatever additional relief equity demands.

COUNT IV

56. Plaintiffs reallege paragraphs 2-35 of Count I.

57. That the transaction of August 25, 1988, from Plaintiffs to Defendants was in violation of Section 4 and/or Section 5 of Michigan Public Acts of 1919, No 310, as amended, (MCL 566.14 and MCL 566.15) in that said Plaintiffs were insolvent or became insolvent due to said transaction

and the transaction was made without fair consideration; and/or the transaction, which was without fair consideration, was at a time when the Plaintiffs were engaged in the business of selling and/or developing real estate and said transaction left Plaintiffs with an unreasonably small capital.

58. That the transaction or transfer of August 25, 1988, is voidable and must be set aside.

WHEREFORE, Plaintiffs pray the Court:

1. Declare the transfer to be null and void;

2. Order the return of the property to Plaintiffs, subject to a mortgage to Defendants in the amount of $350,000;

3. Grant such other relief as is just and proper.

COUNT V

59. That this is an action for damages which exceed $10,000.

60. Plaintiffs reallege paragraphs 2-35 of Count I, paragraphs 38-43 of Count II and paragraphs 46-50 of Count III.

61. That on or about the 7th day of February 1989 and prior thereto Plaintiffs were negotiating with various prospective purchasers for the sale of all or various portions of Plaintiffs above described property, all of which was well known to the Defendant, Robert Soltow, and his agent at the time.

62. That on or about the 7th day of February 1989, and prior thereto, the Defendant, Robert Soltow, and his agent, published and declared to others, including Plaintiffs' prospective purchasers, that Plaintiffs title was impaired, that they had no right to convey or that the title was otherwise defective.

63. That the aforesaid publications were communicated to others, including various prospective purchasers, and after

7th of February 1989 to the public generally, all of whom understood the publications to mean that Plaintiffs did not own or could not convey title to the property.

64. That Plaintiffs were unable to pursue prospective purchasers after learning of the recordation of the affidavit of February 7, 1989.

65. That the above statements and publications made by Defendant, Robert Soltow, and his agent, were false when made, known by Defendant and his agent to have been false when made and were specifically made for the purpose of preventing Plaintiffs from entering an agreement to convey to the then existing prospective purchasers for the further purpose of preventing, after 7 February 1989, Plaintiffs from entering an agreement with any and all prospective purchasers.

66. That Plaintiffs have been unable to secure any other prospective purchasers

for the property or any part thereof, and such inability is solely attributable to the wrongful conduct of the Defendant and his agent.

67. The aforesaid conduct on the part of the Defendant, Robert Soltow, and his agent, was purposeful, willful and intentional, and done specifically for the purpose of defeating Plaintiffs' lawful rights and constitutes a continuing invasion of their rights sufficiently outrageous to support an award of punitive damages.

68. That at the time of the aforesaid wrongful conduct of the Defendant's employee or agent, such employee or agent was acting within the course and scope of his employment or agency duties or, in the alternative, was acting within the course and scope of his apparent authority, or in the alternative, was acting only in accordance with the specific authority or approval of the Defendant, given in ad-

vance, or in the alternative, such conduct of the Defendant's employee or agent was subsequently ratified by Defendant, any or all of which is sufficient for liability to be imputed to the Defendant, Robert Soltow.

WHEREFORE, Plaintiffs demand judgment against the Defendant Robert Soltow for compensatory and punitive damages, all costs hereof and such other relief as is appropriate.

____/s/_____
Richard L. Fishell,
Plaintiff

Subscribed and sworn to before me this

22d day of February 1991.

_____/s/_____
Susan J. Oberlin,
Notary Public
Ingham County
My Commission Expires:
6/15/92

LESTER N. TURNER P.C.

By_____/s/_____
Lester N. Turner (P21632)
Attorney for Plaintiffs
Business Address
4970 Northwind Drive
Suite 200
East Lansing, MI 48823
Telephone No (517)332-790

(Omitted: Exhibit A Warranty Deed
Fishells to Soltow, 8/25/88
Exhibit B Warranty Deed
Wight to Fishell, 7/8/86
Exhibit C Affidavit of
Attorney Douglas Austin)

11 USC 502 Allowance of claims or interests

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

(b) Except as provided in subsections (e)(2) (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim inlawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that-

(1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;

(2) such claim is for unmatured interest;

(3) if such claim is for a tax assessed

against property of the estate, such claim exceeds the value of the interest of the estate in such property;

(4) if such claim is for services of an insider or attorney of the debtor, such claim exceeds the reasonable value of such services;

(5) such claim is for a debt that is unmatured on the date of the filing of the petition and that is excepted from discharge under section 523(a)(5) of this title;

(6) if such claim is the claim of a lessor for damages resulting from the termination of a lease of real property, such claim exceeds-

(A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of-

(i) the date of the filing of the petition; and

(ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property; plus

(B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates;

(7) if such claim is the claim of an employee for damages resulting from the termination of an employment contract, such claim exceeds-

(A) the compensation provided by such contract, without acceleration, for one year following the earlier of-

(i) the date of the filing of the petition; or

(ii) the date on which the employer directed the employee to terminate, or such employee terminated, performance under such contract; plus

(B) any unpaid compensation due under such contract, without acceleration, on the earlier of such dates; or

(8) such claim results from a reduction, due to late payment, in the amount of an otherwise applicable credit available to the debtor in connection with an employment tax on wages, salaries, or commissions earned from the debtor.

28 USC 158 Appeals

(a) The District Courts of the United States shall have jurisdiction to hear appeals from final judgments, orders and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

(d) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders and decrees entered under subsections (a) and (b) of this section.

28 USC 1254 Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Rule 3007 Objections to Claims

An objection to the allowance of a claim shall be in writing and filed. A copy of the objection with notice of the hearing thereon shall be mailed or otherwise delivered to the claimant, the debtor or debtor in possession and the trustee at least 30 days prior to the hearing. If an objection to a claim is joined with a demand for relief of the kind specified in Rule 7001, it becomes an adversary proceeding

Rule 9019 Compromise and Arbitration

(a) Compromise. On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.

Rule 9023 New Trials; Amendment of Judgments

Rule 59 F R Civ P applies in cases under the Code, except as provided in Rule 3008.

[NOTICE LIS PENDENS]

[Sec]27A.2701 Lis pendens as constructive notice; filing; contents; recording, evidence.] Sec. 2701. (1) To render the filing of a complaint constructive notice to a purchaser of any real estate, the plaintiff shall file for record, with the register of deeds of the county in which the lands to be affected by such constructive notice are situated, a notice of the pendency of such action, setting forth the title of the cause, and the general object thereof, together with a description of the lands to be affected thereby.

(2) Such a notice may be filed with the complaint before the service of the summons; but, in that case, personal or substituted service of the smmons must be made upon a defendant, within 60 days after the filing, or else, before the expiration of the same time, publication must be commenced, or service thereof must be made without the state, as prescribed by law. If the defen-

dant dies within 60 days after the filing of the notice and before commencement or completion of service of the summons, the summons may be served upon the person substituted for the defendant within 60 days after such substitution.

(3) The register of deeds shall record such notice, in a book kept for that purpose, upon the payment of the fee as is provided by law. A copy of such record, authenticated by the register of deeds, is evidence of such notice, and the recording of the same, in all courts and places. (MCL 600.2701)

Sec 27A.2711 Same; notice by defendant.] Sec. 2711. Where a defendant sets up in his answer a counterclaim, upon which he demands an affirmative judgment affecting the title to, or the possession, use or enjoyment of real property, he may file for record a like notice at the time of filing his answer or at any time afterwards before final judgment. For these purposes, the defendant filing

such a notice is regarded as a plaintiff and the plaintiff is regarded as a defendant. (MCL 600.2711).

Sec 27A.2715 Duration of notice; extension] Sec. 2715. (1) A notice of pendency hereafter filed for record shall be effective as notice for a period of 3 years from the date of filing. Before the expiration of the period, the court upon application of the plaintiff and upon such notice as may be directed or approved by the court, and for good cause shown, may from time to time grant additional orders each extending the period of duration of the notice of pendency for a period of not more than 3 years. If extended, a copy of the notice stating the date of filing of the immediately preceding notice, and stamped or marked "extended", shall be filed for record, recorded and indexed prior to the expiration of the notice of pendency then in force in the manner prescribed in this chapter.

(2) A notice of pendency heretofore filed shall be effective for a period of 3 years from the effective date of this act, and shall be subject to extension as herein prescribed. (MCL 600.2715)

Sec 27A.2721 Index] Sec. 2721. Each register of deeds shall enter in an index to be kept in his office, such references to the said notices, as will enable all persons interested to search his office for such notices without inconvenience. (MCL 600.2721).

Sec 27A.2725 Cancellation of notice; liability of plaintiff for costs and expenses.] Sec. 2725 (1) If a plaintiff filing the notice before the service of a summons fails to serve the same within the time prescribed in this chapter, or after the action is settled, discontinued or abated, or final judgment is rendered therein against the party filing the notice, and the time to appeal therefrom has expired,

the court, upon the application of any person aggrieved and upon such notice as may be directed or approved by it, shall direct that a notice of the pendency of an action be cancelled of record by a particular register of deeds, or by all the registers of deeds, with whom it is filed.

(2) If a plaintiff filing the notice unreasonably neglects to proceed in the action, or does not commence or prosecute the action in good faith, the court, in its discretion, upon the application of any person aggrieved and upon such notice as may be directed or approved by it, may direct that a notice of pendency of an action be cancelled of record by a particular register of deeds, or by all the registers of deeds, with whom it is filed.

(3) The cancellation shall be made by a note to that effect, on the margin of the record, referring to the order. A certified copy of the order shall be filed for record

with the register of deeds before the notice is cancelled.

(4) The court, in its discretion, upon directing cancellation of the notice upon termination of the action, or during the pendency thereof if satisfied that the plaintiff who filed the notice unreasonably neglected to proceed in the action or did not commence or prosecute the same in good faith, may direct the plaintiff to pay all or any of the costs and expenses occasioned by filing the notice and the cancellation of the record, aside from the costs of the action itself. (MCL 600.2725)

Sec 27A.2731 Same; by bond; security if not cancelled; recovery on bond.] Sec. 2731. (1) In any pending or future action, other than an action to foreclose a mortgage or for the partition of real property or for dower, in which a notice of the pendency thereof has been filed and in which it appears to the court that adequate relief can be

secured to the party who filed the same by the giving of a bond, where the cancellation of such notice is not otherwise expressly provided for or regulated, any person having an interest in the property affected by the action may apply for the cancellation thereof upon notice to all the parties to the action and to such other persons as the court may direct.

(2) The court in which the action is pending may make an order for the bond upon such terms as to costs or otherwise as may seem just. The discretion vested in the court by this section may be exercised in any such action, notwithstanding the same may have been brought to recover a judgment affecting the title to, or the possession, use or enjoyment, of specific real property.

(3) Upon an application as provided in subdivision (1) for cancellation of the notice of pendency, made in any pending or future action for specific performance of

a contract to convey real property, whether or not the court determines that adequate relief can be secured to the party filing the notice of pendency by the giving of a bond, the court may order that the notice be cancelled, upon the giving of a bond by the applicant upon terms fixed in the order, as provided in subdivision (2), unless the person filing the notice of pendency gives a bond, upon terms to be fixed by the order.

(4) The bond shall be in an amount which the court, upon consideration of the affidavits submitted upon the application, deems sufficient to indemnify the applicant for the damages he may incur if the notice of pendency is not cancelled.

(5) The order shall provide that upon failure of the person filing the notice of pendency to give a bond in accordance with the order, the notice of pendency shall be cancelled upon the giving of a bond by the applicant, as provided herein.

(6) Where the person who filed the notice of pendency has given a bond as provided in the order, recovery may be had upon the bond without further leave of the court, upon the discontinuance or abatement of the action, or the cancellation of the notice of pendency because of the neglect of such person to proceed in the action, or upon final judgment against him. The recovery may be obtained by a separate civil action, or by motion in the action as to which the notice was filed. (MCL 600.2731)

Sec 27A.2735 Federal courts; application of chapter.] Sec. 2735 (1) This chapter applies to suits affecting title to real property in the federal courts.

(2) The register of deeds shall file and index notices of the pendency of actions in the federal courts as prescribed herein.

(3) If a suit is removed to a federal court, or remanded to a state court, no additional notice need be filed; the notice

filed in the action prior to removal or remand remains in effect. (MCL 600.2735)

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

94-1109

IN RE

Richard L. Fishell and

Dorothy M. Fishell

Debtors

Richard L. Fishell and

Dorothy M. Fishell

Plaintiffs/Appellants

vs

Robert Soltow and

Rosalee Soltow

Defendants/Appellees

PETITION FOR REHEARING

AND SUGGESTION FOR REHEARING IN BANC

Roger L. Fishell
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Attorney for Petitioners

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REQUIRED STATEMENTS FOR REHEARING

IN BANC

I express a belief, based on a reasoned and studied professional judgment, that the

panel decision is contrary to the following decision(s) of the United States Court of Appeals for the Sixth Circuit or the Supreme Court of the United States and that consideration by the full Court is necessary to secure and maintain uniformity of decisions:

Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v Anderson, 390 US 414, 88 S Ct 1157, 20 L Ed 2d 1 (1968) reh den 391 US 909, 88 S Ct 1649, 20 L Ed 2d 425 (1968).

And further,

I express a belief, based on reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

1. The above Supreme Court case was cited by the parties to this appeal and by this Court in the panel opinion and its proper interpretation is signficant because in the words of the above cited Supreme Court decision, "We granted certiorari, (cite omitted), because this case presents

important questions under the bankruptcy laws." 390 US at 418.

2. Whether the panel decision in this case announces a departure from prior precedent concerning the evidentiary standards or burdens placed upon compromise proponents in compromise proceedings in bankruptcy court under Rule 9019 of the Bankruptcy Rules.

3. Whether the panel decision in this case announces a departure from prior precedent concerning the adequacy of the compromise hearing record which must be made before the bankruptcy court so that an appellate court may determine whether the bankruptcy court has rendered "an informed and independent judgment" on the propriety of a compromise which that court approves.

4. Whether the panel decision properly determined that the Debtors lacked standing to appeal an order of the bankruptcy court, rendered pursuant to Rule 9019,

entered over the Debtors' objection, where no 6th Circuit authority is cited in support of the panel decision and the panel decision conflicts with the decision of the 1st Circuit, cited by the panel as authority, and conflicts with 7th circuit authority more directly and factually relevant.

5. Whether Debtors in cases, such as this one, which are not "no-asset" cases may be denied standing to appeal an order rendered pursuant to Rule 9019, entered over their objection where such order, both, forecloses the Debtors from possible recovery of property through an adversary proceeding and concurrently forecloses consideration of the Debtors objection, filed pursuant to Rule 3007, to a Proof of Claim filed against their bankruptcy estate.

6. Whether the panel decision results in the creation of a conflict between the

law of this circuit and the law of the 7th and 9th circuits as well as that set forth by the United States Supreme Court.

__/s/_____
Roger L. Fishell
Attorney for Petitioners

PETITION FOR REHEARING

Pursuant to Rule 40, Fed R App Pro, and Sixth Circuit Rule 14, the appellants move the court to grant rehearing or reconsideration of the decision entered in the above cause on 16 February 1995 and in support of this motion submit the following.

THE FACTS

Appellants respectfully submit that the court may have overlooked or misapprehended the following matters of a factual nature. The opinion contains factual errors which may well bear upon the ruling of the Court. These are set forth below.

1. The opinion states at p. 1 that "Fishells used the money to purchase a certain parcel of real estate and gave the

Soltows promissory note and a mortgage on the property."

Fishells had purchased the property prior to the time that any loan to them was made by Soltow. See Appellants' Brief, p. 8, fn 23 & 24, [R1(14)][R1(G)].

2. The opinion further states at p. 2 that, as regards the amended agreement of 25 August 1988, "the Soltows agreed not to start foreclosure proceedings and extended the time for repayment of the loan."

This is misleading because there was no extension of time provided, in practical effect, since the cut off date provided for in the amended agreement, to-wit, 15 February 1989, was less than six (6) months from the date of that amended agreement, to-wit, 25 August 1988. The deed in lieu of foreclosure aspect of the amended agreement of 25 August 1988 effectively cut off Fishells redemption rights (without specifically saying so). As a result, Fishells

rights in the property were terminated more fully at an earlier point than would have been the case under the original mortgage. See Appellants' Brief, p. 10, fn 32, p. 12, fn 43, p. 28, fn 76, [R1(11)(14)]. These issues were relevant to the allegations of fraud and lack of consideration raised by Fishells as grounds for setting aside the deed to Soltow. (R(6)).

3. The panel opinion concludes at p. 2 that the Fishells had defaulted under the original mortgage, and Soltow did so allege, however, no court ruling ever concluded this to be so and the Debtors contended that no default had occurred because, under the interest-only repayment provisions, the admitted presence of usury rendered no such interest due. See (R1(11)(14), Appellants' Brief, 9-11, & 12, fns 27-38 & 44, [Tr 7/10/92, p. 21-22]

4. The panel opinion also concludes at p. 6 that the bankruptcy court had the

record of the state court proceedings in the case, however the state court never ruled on the merits of the case as the state court only determined that the Fraser firm, as attorneys for Soltow, need not be disqualified as his counsel in that case. See (R1(5))(Bankruptcy docket sheet entries, #4-6), see also Appellee Soltow's Brief, p. 6.

5. The record before the bankruptcy court (the bankruptcy judge did not conclude that the Debtors lacked standing to object to the compromise) and the District Court contained the Debtors' asset and liability information, contrary to the opinion of the District Court. See p. 4 of the 16 February 1995 opinion. This information was provided in the Debtors schedules, in argument at the compromise hearing, in the exhibits to submissions filed by Soltow in the bankruptcy court and in District Court. This information was included in the appeal

record in this court and was supplied in the Joint Appendix filed with this court. As such the record consistently reflected that the Debtors' assets significantly exceeded their liabilities at the commencement of the bankruptcy proceedings. See Appellants' Brief, p. 35, fn 82, p. 40, fn 91, p. 42, fn 93, [R1(8)(11)(14)] [R1(P)(Q)], [Tr 7/10/92, p. 20-29].

6. The opinion at p. 7 addresses the merits of the adversary proceeding. As to the issue of fraud, lack of consideration and equitable mortgage, the loss of Fishells' redemption rights through the 1988 agreement is highly relevant. See Appellants' Brief, p 12, fn 43 & p. 25, 71. As to the issue of costs of litigation, the validity of the usury claim is relevant because its effect could deny Soltow both interest and attorneys fees incurred relative to enforcement of the amended mortgage. See Appellants' Brief, p.12, fn 44,

[R1(11)(14)]. This is doubly relevant because of the substantial divergence of debt to equity, i.e. approximately $450,000 as the principal amount of the debt, vs. $1.38 million, as the appraised property value. See Appellants' Brief, p. 9, fn 25, p. 10, fns 30-32 and p. 11, [R1(11)(14)]. The absence of merit to the Soltow slander of title claim reduced any potential for loss to the estate through litigation. See Appellants' Brief, p. 9, fn 25, [R1(8-11)(13)(14)]. A finding by the bankruptcy court that Soltow's slander of title claim lacked merit, had it considered the issue, could have led the Trustee to either go forward with the trial of the adversary proceeding in August 1992, see Appellants' Brief, p. 4-5, 11, 20-21, & 40, or could have led the Trustee to abandon the adversary proceeding to Appellants' pursuant to 11 USC 554.

The Debtors possessed standing to appeal

resolution of the Soltow Amended Proof of Claim, also compromised as part of the settlement orders appealed, since under 11 USC 502 and Rule 3007, they were "aggrieved parties" who had properly filed an objection to that proof of claim. See Appellants' Brief, p. 37-39.

THE LAW

Appellants respectfully submit that the court may have overlooked or misapprehended the following points of law.

1. Standing. The Debtors possessed standing to appeal under any analysis. In the 16 February 1995 decision, the court relies on In Re El San Juan Hotel, 809 F 2d 151 (1st Cir 1987). Three bases for standing are noted with approval in that case, one of which is whether the order appealed "impairs his (appellant's) rights". 809 F 2d at 154. The compromise of the adversary proceeding diminished the prospect that the Appellants in this case could emerge

from liquidation proceedings with some assets and thus "impaired their rights" under the El San Juan analysis. In any event, El San Juan did not involve the appeal of an order of the nature involved here because the order in that case did not foreclose the right of the litigant to protect his interest. The order sought to be appealed in El San Juan merely authorized another action wherein the allegedly aggrieved party would have full opportunity to protect its rights. See El San Juan 809 F 2d at p 155. In the present case, Appellants were forever foreclosed from any relief by the settlement or compromise which is the subject of this appeal.

The equity involved in the disputed property, and the possibility that this could have been ultimately been restored to these Debtors upon a successful appeal to this court, gave the Debtors standing to appeal an order which forever deprived them of

this opportunity. A successful appeal could have resulted, ultimately, in a trial in bankruptcy court and a result favorable to the Debtors. An order, such as the order on appeal, which extinguishes the Debtors' chance of obtaining a surplus sufficiently adversely affects the "pecuniary interest" to give standing. Matter of Andreuccetti, 975 F 2d at 417. Under the Andreuccetti analysis, these Debtors had standing to appeal. See Appellants' Brief, p. 40, fn 91, p 43-44.

The Appellants possessed standing to appeal disposition of the Soltow Amended Proof of Claim under 11 USC 502 and Rule 3007. See Appellants' Brief, p. 37-39.

2. Standards for Approval of Compromise. Each of the cases cited by the Court supports the position asserted by the Appellants rather than the position taken by the compromise proponents. The bankruptcy court in the present case allotted 60

minutes for consideration of the proposed compromise, of which 40 minutes was allotted to the compromise proponents and 20 minutes was allotted to the Debtors/Appellants. See Appellants' Brief, p. 6 and p 14 fn 52 [R1(26)], [Tr 7/10/92, p 4-5]. No evidence was presented, in any form, by the proponents of the compromise, see Appellants' Brief, p. 27, [Tr 7/10/92, p. 31], and no findings, material to the issues raised in the Fishells' adversary complaint or Soltow's amended proof of claim, appear in the bankruptcy court's opinion approving the compromise. See Appellants' Brief, p. 17 fn 58 & 61, [Tr 7/10/92, p. 5-15 and p. 32-37].

This court notes, in its 16 February 1995 opinion, reliance upon Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc., v Anderson, 390 US 414 (1968), In Re American Reserve Corporation, 841 F 2d 159 (7th Cir 1987) and In Re A & C

Properties, 784 F 2d 1377 (9th Cir) cert den 479 US 854 (1986). In In Re A & C Properties the appellate court affirmed a compromise approved by the bankruptcy court where "the bankruptcy court held five days of hearings on the Trustee's application for compromise" 784 F 2d at 1381. In In Re American Reserve Corp., the appellate court reversed the lower court's approval of a compromise on the basis that the record contained inadequate findings despite the fact that the bankruptcy court in that case had heard "testimony" from the Trustee as well as argument of the Trustee's attorneys, appellants and others. In TMT Trailer Ferry, see Appellants' Brief, p. 45-49, which sets forth the current governing standard, the United States Supreme Court reversed approval of a compromise made after hearings and evidentiary submissions had been made in the lower court. At 390 US at 450, the Supreme Court, though recognizing the neces-

sity for avoiding protracted proceedings, noted that

> "The need for expedition, however, is not a justification for abandoning proper standards."

The bankruptcy court decision complained of by the Debtors in this case was arrived at without evidentiary submission in any form and contained no findings or analysis by the bankruptcy court on the issues set forth in either of the two (2) matters being compromised, to-wit, 1) the adversary complaint filed by Fishells or 2) in the Amended Proof of Claim filed by Soltow. See Appellants' Brief, p 22-28, [Tr 7/10/92 p. 37-42]. This procedure does not comport with any authority cited to the court in the briefs and does not accord with any authority cited by this court in its 16 February 1995 opinion.

In the 16 February 1995 opinion, the court authorizes a departure from the standards affirmed in each of the above cited

cases and results in a decision which does not accord with the standard adopted by the Supreme Court, as noted above, nor with the standard adopted in any circuit.

Wherefore, the Appellants respectfully submit that this matter should be reconsidered or reheard and respectfully pray that this court grants such relief.

SUGGESTION FOR REHEARING IN BANC

Pursuant to Rule 35, Fed R App Pro, and 6th Cir Rule 14, the Petitioners respectfully suggests to this Honorable Court that the above entitled cause is appropriate for consideration on rehearing by all the Judges of this Court convened in banc. In support hereof the Petitioners show:

1. The panel opinion in the above cause contains the factual misstatements and the erroneous legal conclusions noted in the petition for rehearing. The deficiencies alleged by Petitioners are of substantial significance in terms of the Petitioners'

case and in terms of the development of the law on these significant bankruptcy within the Sixth Circuit. The elements of the petition are hereby incorporated in this suggestion for rehearing in banc as if fully set forth herein verbatim.

2. The case involves the proper standard to be observed for proceedings in bankruptcy courts relative to the settlement of controversies pursuant to Federal Bankruptcy Rule 9019. This case also involves the proper application of the mandates outlined by the United States Supreme Court in Protective Committee for Independent Stockholders of TMT Trailer Ferry Inc., v Anderson, 390 US 414 (1968).

3. The panel opinion cites as authority for its decision the above noted Supreme Court decision as well as authorities from the 7th and 9th circuits. These authorities set forth certain requisites regarding the evidentiary threshholds which must be met

by settlement proponents and the bankruptcy judge before the bankruptcy court may properly approve a settlement of a controversy under Rule 9019. The cited authorities also outline certain standards for bankruptcy court analyses and findings of fact which must be met for the creation of a bankruptcy court record which would be sufficient to enable meaningful appellate review of the adequacy of the bankruptcy court's consideration and analyses of the settlement proposal.

4. The panel opinion does not cite any 6th Circuit authority on these issues. A review of the panel opinion and the bankruptcy court record reveals that the authorities upon which the panel opinion purports to rely can not be reconciled with the opinion of the panel in this case. A review of the bankruptcy court record of the compromise proceedings and the panel opinion would support the conclusion that the 6th Circuit

has now permitted bankruptcy court settlements based upon an evidentiary showing that is markedly less rigorous than the showing that is required by TMT Trailer Ferry or by the 7th and 9th circuits.

5. A review of the authorities cited by the panel opinion demonstrates that those authorities consistently employed, and envisioned, some evidentiary submission before the bankruptcy court, in some testimonial or other evidentiary form, by the settlement proponents, in support of a proposed settlement under Rule 9019 so that the record of the bankruptcy court proceedings would adequately reveal, to a reviewing court, that the compromise ultimately approved by the bankruptcy judge 1) was the product of "an informed and independent judgment", at 390 US p. 424, 2) which had considered "all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise", at 390 US p. 424, and 3) repre-

sented a decision that was "fair and equitable". at 390 US p. 434. The reviewing court must be given, as noted in TMT Trailer Ferry, at 390 US p 434,

> "...some basis for distinguishing between well reasoned conclusions arrived at after a comprehensive consideration of all relevant factors, and mere boiler plate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law."

Appellants' Brief, p 48-49.

6. The facts of the particular case at issue reveal that 1) there were no evidentiary submissions, whether written or testimonial, or in any form, offered by the proponents of the compromise on any issue material to consideration of that compromise and 2) no findings of fact or other specific analysis of the merits of the two (2) controversies being settled were recited or made by the bankruptcy judge. Despite the panel's admitted dissatisfaction with the record made in the bankruptcy court, see Panel Opinion, p. 6, it nonetheless sus-

tained approval of the compromise. In so doing, the panel has established a diminished threshhold for Rule 9019 compliance which is markedly at odds with the requirements set out in TMT Trailer Ferry and the other authorities noted. It necessarily follows that the panel decision is in conflict with the standards adopted in the 7th and 9th circuits and it further follows that the panel decision is in conflict with the standards adopted by the Supreme Court in TMT Trailer Ferry.

Wherefore, the Petitioners respectfully request that a rehearing of the appeal in the above case be granted and Petitioners respectfully request that the members of this Honorable Court order that the above case be reheard in banc.

As counsel for Petitioners herein I certify that the foregoing Petitions are advanced upon good grounds and in complete

good faith and not for the purpose of delay.

___/s/_____
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Appellants

(Certificate of Service omitted)

UNITED STATES BANKRUPTCY COURT

WESTERN DISTRICT OF MICHIGAN

In Re:

RICHARD L. FISHELL and
DOROTHY M. FISHELL,

Debtors.

Case No. 90-85144
HON. DAVID E. NIMS, JR.
Chapter 11

RICHARD L. FISHELL and
DOROTHY M. FISHELL,

Plaintiffs,

v

Adversary No. 91-8015

ROBERT SOLTOW and
ROSALEE SOLTOW,

Defendants.

---/

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---/

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGEMENT AND IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGEMENT

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INTRODUCTION

On April 23, 1982, Defendant R. Soltow loaned Plaintiffs the sum of $10,000 and made additional loans through March 24, 1988, wherein Defendant R. Soltow had loaned either to Richard Fishell or to Richard Fishell and Dorothy Fishell six separate loans totaling in principal amount the sum of $456,250. Defendant Soltow made the last loan to Plaintiff Richard Fishell on March 24, 1988, in the amount of $55,000. There were six of these transactions and $106,250 of the total principal sum owed was made up of five notes with no security. The sixth note was for $350,000 and took the subject property as security. Defendant R. Soltow charged Plaintiffs a usurious rate of interest on all six loans. These loans

were consolidated into one amended promissory note on August 25, 1988. That note carried forward and included all the usurious interest charged on all six loans prior to August 25, 1988. Also on August 25, 1988, Defendant Soltow received from Plaintiffs a mortgage on the subject property included the indebtedness of all six loans together with all the usurious interest charged on all six loans.

Plaintiffs discuss three issues or three remedies concerning these transactions between the Plaintiffs and Defendant Robert Soltow. The first claim is that Defendants charged usurious interest rates on all six loans which were carried over and included in the amended note on August 25, 1988. The second claim is fraud, which includes actual fraud, innocent misrepresentation and silent fraud committed on the Plaintiffs by Defendant Robert Soltow individually and

through Attorney Douglas J. Austin, and said fraud gave rise to the documents executed August 25, 1988. The third claim is that Defendants have an equitable mortgage against Plaintiffs' property. Defendant Robert Soltow is claiming that the documents signed on August 25, 1988, gave him title to the property rather than security. Defendant Robert Soltow is therefore claiming ownership of property valued in excess of $1,380,000 based on making a loan of $350,000, secured by said property.

Obviously, this is a very brief introduction to a very voluminous and detailed factual situation. However, Plaintiffs will very carefully and thoroughly take this Court through the duress, fraud and overreaching practiced by Defendant Robert Soltow on Plaintiffs. Plaintiffs will demonstrate to the Court that Plaintiffs are entitled to summary judgment on all

three issues.

Plaintiffs will interweave statements of facts with legal argument because Plaintiffs believe that the approach will make it easier to follow Defendant Robert Soltow's and Attorney Austin's paper trail. Plaintiffs will present the matters in a chronological fashion to the Court. (3)

STATEMENT OF FACTS RE: LOANS
PRIOR TO AUGUST 25, 1988 TRANSACTION

The Plaintiffs and Defendants have been neighbors for at least twenty years. Plaintiff Richard Fishell and Defendant Robert Soltow have had a personal relationship, which Plaintiff Richard Fishell, assumed to be a friendship, for the last twelve to fourteen years. Plaintiff Richard Fishell and Defendant Robert Soltow would get together socially on a fairly regular basis from the last twelve to fourteen years up until the time this

present dispute arose. Due to this neighborly and personal relationship, Plaintiff Richard Fishell asked Defendant Robert Soltow, on or about April 23, 1982, if Defendant Robert Soltow would make a $10,000 loan to Plaintiff R. Fishell for personal use, i.e. to buy fertilizer for the farm on which Plaintiffs Fishells reside. Defendant Robert Soltow agreed to same, and on April 23, 1982, Defendant Robert Soltow loaned to Plaintiff Richard Fishell the sum of $10,000 at 0% per annum interest. The promissory note required payment in 160 days (October 1, 1982). Defendant Soltow had both Plaintiffs sign said note and named the payees as Robert Soltow or Rosalee M. Soltow.

Plaintiff Richard Fishell and Defendant Robert Soltow continued their neighborly personal relationship and also became involved in many additional situations wherein Defendant Robert Soltow loaned

money to Plaintiff Richard Fishell. A summary of those transactions is as follows: (4)

1. Loan to Fishells from Soltows dated April 23, 1982, in the amount of $10,000, due and payable in 160 days (October 1). This was the personal loan for fertilizer for Fishells' farm, where Plaintiffs reside. The note provides for no interest. However, Defendant Robert Soltow prepared the note that called for repayment of $10,625 on October 1, 1982 (Plaintiffs' Exhibit 1 and Soltow Deposition, P. 28). According to documents prepared by Defendants (Plaintiffs' Exhibits 2, 3 & 7), Defendants claim they charged Plaintiffs 12 1/2% interest on the no interest note. However, on November 13, 1983, Plaintiffs made a payment on this note of $6,000 (13 1/2 months after the whole note was due). Defendant Robert Soltow's records indicate that after receipt of this payment,

Plaintiffs still owed $6,221 on this $10,000 loan. Defendants reach this conclusion by purporting to have charged Plaintiffs 12 1/2% interest. However, Plaintiffs' Exhibit 2 shows that Defendants charged interest of $2,221 from 4/23/82 to 11/13/83. This is 538 days and works out to be $3.81 a day or $1,390.65 a year, which is really 13.9% interest. So not only was 12 1/2% usurious, but Defendants then chared the Plaintiffs $2.14 a day from 11/13/83 until the note of August 25, 1988 was signed (Plaintiffs' Exhibits 2, 3, 7 and Austin Deposition of 3/20/91, Pp. 62 & 63), which is 12.55% interest.

2. Loan of January 29, 1986, in the amount of $6,250 from Defendant R. Soltow to Plaintiff R. Fishell for personal (5) use for Mr. Fishell to pay off an indebtedness on a tractor for his farm so that Mr. Fishell could pick up the tractor for his farm use. No promissory note was

executed; therefore, no interest rate was provided. However, as will be discussed later, Defendant charged Plaintiff 12% interest on this loan (Plaintiffs' Exhibit 3, 4 and 7).

3. July 8, 1986, loan from Defendant R. Soltow to Plaintiff R. Fishell in the amount of $350,000 to pay off the purchase of the property at issue herein. This loan was evidenced by a promissory note signed by both Plaintiffs, in the amount of $350,000 at 15% per annum interest on the unpaid balance until paid and 20% per annum on the unpaid balance until paid during the period of any default. The principal sum of $350,000 was to be due July 7, 1989. Interest payments were to be made each January 7th and July 7th, beginning January 7, 1987, and ending July 7, 1989, the amount of the payment to be the interest accrued on the unpaid principal balance during the immediately pre-

ceding six months. The note was secured by a mortgage given by Plaintiffs to Defendant Robert Soltow on July 8, 1986, and said mortgage covered the property involved in this litigaton. The note and mortgage were prepared by Douglas J. Austin of the Fraser, Trebilcock, Davis & Foster law firm (note, Plaintiffs' Exhibit 5). As will be discussed later, Defendant charged Plaintiffs in excess of 20% interest on this note (Plaintiffs' Exhibit 3). (6)

4. Loan in the amount of $10,000 on July 16, 1987, and evidenced by a promissory note on same date, signed by both Plaintiffs with Robert Soltow named as payee. The note was payable on demand and provided for interest at the rate of 12% per annum (Plaintiffs' Exhibit 6). Soltow does not remember this unsecured loan for $10,000 and believes it was $25,000 on July 16, 1987; however there is no note for $25,000 in July 1987. How-

ever, as will be dicussed later, Soltow charged Plaintiffs 12% interest on a $10,000 loan of July 16, 1987 (Plaintiffs' Exhibits 3 and 7; also see Robert Soltow's deposition of March 20, 1991, Pp. 49-53).

5. Loan in the amount of $25,000 evidenced by a promissory note dated September 3, 1987. This note was signed by both Plaintiffs and named Robert Soltow as the payee. It was a demand note and set forth interest at the rate of 12% per annum (Plaintiffs' Exhibit 8).

6. Loan in the amount of $55,000 evidenced by a promissory note dated March 24, 1988. This promissory note was signed by Plaintiff Richard Fishell and named Defendant Robert Soltow as the payee. It was a demand note and provided no interest. (Plaintiffs' Exhibit 9).

Defendant Soltow received a bill of sale on a Case tractor for loan #2 set forth above (the loan in the amount of $6,250)

(Plaintiffs' Exhibit 10). The only other loan that was collateralized was loan #3, being the $350,000 loan, which was secured by a mortgage on the real estate involved herein. There (7) were no sworn statements from either Plaintiffs in writing indicating that any of the above loans wee for business purposes, except for $70,000 of the $350,000 loan made on July 8, 1986 (Plaintiffs' Exhibit 11). There were no payments made on any of the loans, except the $6,000 payment made on loan #1, supra. As indicated above, three of the notes required no interest payments and no interest accrual. The first note in fact had the space where the percentage of interest is to be written in marked through. All the exhibits referred to above are exhibits from Defendants or their attorney.

ARGUMENT ON USURY

MCL 438.31; MSA 19.15(1) contains the general provision as to the interest rate

legally permissible in Michigan. It provides in pertinent part:

> "The interest of money shall be at the rate of $5.00 upon $100.00 for a year, and at the same rate for a greater or lesser sum, and for a longer or shorter time, except that in all cases it shall be lawful for the parties to stipulate in writing for the payment of any rate of interest, not exceeding 7% per annum."

MCL 438.31c; MSA 19.15(1c) sets forth exceptions to this general usury provision, including exceptions with regard to indebtedness secured by a lien against real property. Of the six loans listed above, the only loan that was secured by real property was loan #3, in the amount of $350,000. The subsection pertinent to that loan is as follows:

> "(11) The parties to a note, bond or other indebtedness of $100,000 or more, the bona fide primary security for which is a lien (8) against real property other than a single family residence, or the parties to a land contract of such amount and nature, may agree in writing for the payment of any rate of interest."

MCL 438.61; MSA 19.15(71) sets forth a

business entity exception. This exception is applicable because the $350,000 loan of July 8, 1986 included a business purpose affidavit for at least $70,000 of the $350,000 loan (Plaintiffs' Exhibit 11).

MCL 438.61; MSA 19.15(71) provides:

> "438.61. Business entities, definition, interest rate agreements.
>
> Sec. 1(1) As used in this act 'business entity' means:...
> (b) A natural person who furnishes to the extender of the credit a sworn statement in writing specifying the type of business and business purpose for which the proceeds of the loan or other extension of credit will be used, but the exemption provided by this act does not apply if the extender of credit has notice that the person signing the sworn statement was not engaged in the business indicated.
> (2) Notwithstanding the provisions of Act No. 326 of the Public Acts of 1966 as amended, being sections 438.31 to 438.33 of the Michigan Compiled Laws, but subject to any other applicable law of this state or of the United States which regulates the rate of interest, it is lawful in connection with an extension of credit to a business entity by a state or national chartered bank, insurance carrier, or finance subsidiary of a manufacturing corporation for the parties to agree in writing to any rate of interest. (Emphasis supplied)

(3) Notwithstanding the provisions of Act No. 326 of the Public Acts of 1966, it is lawful in connection with an extension of credit to a business entity by any person other than a state or nationally chartered bank, insurance carrier, or finance subsidiary of a manufacturing corporation for the parties to agree in writing to any rate of interest not exceeding 15% per year." (Emphasis supplied) (9)

MCL 438.32; MSA 19.15(2) sets forth the penal provision incurred by a violation of the interest limit established in MCL 438.31; MSA 19.15(1), which provides:

"Any seller or lender or his assigns who enters into any contract or agreement which does not comply with the provisions of this act or charges interest in excess of that allowed by this act is barred from the recovery of any interest, any official fees, delinquency or collection charge, attorney fees or court costs and the borrower or buyer shall be entitled to recover his attorney fees and court costs from the seller, lender or assigns."

As pointed out above, Defendant charged Plaintiff 12 1/2% interest on note #1; 12% interest on notes #2, #4, #5 and #6 and in excess of 20% interest on note #3 (Plaintiffs' Exhibits 3 and 7, Soltow's Deposi-

tion, Pp. 59-64).

Note #1 had a line through the space that called for interest payments and another line through the space that called for interest after the note became due if it was still unpaid. Therefore, there was no written interest rate for note #1. There was no note for loan #2. Note #6 had no interest rate provided. Therefore, pursuant to MCL 438.31; MSA 19.15(1), Defendant could not charge Plaintiff in excess of 5% interest because there was no stipulation or agreement in writing by the parties for any rate in excess of 5%. Therefore, the 12 1/2% charged on note #1 and the 12% charged on loan #2 and note #6 were usurious and the penal provisions of MCL 438.32 are applicable. (10)

Notes #4 and #5, for which Defendant charged Plaintiff 12% interest were likewise usurious because MCL 438.31 only allows the parties to charge an interest rate of 7%

unless the agreement fits into one of the exceptions of MCL 438.31c or the business entity exception of MCL 438.61. Neither of these notes fit into either of those exceptions, and the charging of 12% interest brings into effect the penal provisions of MCL 438.32.

Note #3, as set forth above, involved loan of $350,000 and was secured by a first mortgage on the real estate involved herein. In addition, there was a business purpose affidavit as to at least $70,000 of the loan. The real estate was not a single family dwelling and therefore under the exception set forth above in MCL 438.31c(11), the parties could have agreed to any interest rate on that portion of the loan not covered by the business purpose affidavit. Plaintiffs will address this note under both the real estate mortgage exception of MCL 438.31c(11); and the business purpose exception of MCL 438.61, because

under either exception Defendants would be guilty of charging Plaintiffs usurious interest rates on this loan too, bringing into effect the penal provisions of MCL 438.32

Business Purpose Exception: The above quoted language of MCL 438.61(3) sets forth that since defendant is "any person" other than an excepted bank, insurance company or finance corporation of a manufacturer, Defendant could not charge an interest rate in excess of 15% per year. According to Defen(11)dants own record (Plaintiffs' Exhibit 3) and Defendants' attorney's record (Plaintiffs' Exhibit 7), Defendants charged Plaintiffs in excess of 20% interest on this note since the inception of the note, July 8, 1986. Defendants claimed they charged 20% because Defendants said since Plaintiffs never made their first interest payment on January 7, 1987, Plaintiffs were in default and therefore the 20% default

interest rate was applicable (Soltow Deposition, 3/20/91, p. 62).

Real Estate Mortgage Exception:

$280,000 of the $350,000 loan of July 8, 1986, was not covered by the business purpose affidavit and so we must look to the real estate mortgage exception covered by MCL 438.31c(11) (quoted on p. 7, supra). That section provides that the parties may agree in writing to any rate of interest if the note is secured by a mortgage on real estate. It is Plaintiffs' contention that only $280,000 of the $350,000 loan is covered by this section, since the parties specifically provided that $70,000 of the loan was covered by the business purpose exception. However, for purposes of argument Plaintiffs are assuming in this discussion that the whole $350,000 loan of July 6, 1986 is covered by the real estate mortgage exception. Defendants' conduct, assuming the whole $350,000 is within the

real estate mortgage exception, creates an usurious rate of interest on the $350,000 loan. There are several ways in which the interest demanded by Defendants on this $350,000 loan are usurious. (12)

First, the court should look at the pertinent language of the promissory note of July 8, 1986 (Plaintiffs' Exhibit 5), which provides:

> "For value received, the undersigned, jointly and severally, promise to pay to the order of Robert Soltow the principal sum of Three Hundred Fifty Thousand Dollars ($350,000) with interest from this date at the rate of fifteen percent (15%) per annum on the unpaid balance until paid and twenty percent (20%) per annum on the unpaid balance until paid during the period of any default herein....
> The principal sum of $350,000 shall be due July 7, 1989. Interest payments shall be made each January 7th and July 7th, beginning January 7, 1987 and ending July 7, 1989, the amount of the payment to be the interest accrued on the unpaid principal balance during the immediately preceding six (6) months. Notwithstanding the foregoing, all interest accrued to the date of the final principal payment shall be paid with the final principal payment. Princi-

pal may be prepaid without penalty." (Emphasis supplied)

From the date of the inception of the note of July 8, 1986, until the time it was replaced with an amended promissory note on August 28, 1988, Plaintiffs never made any payment of interest or principal on said note. According to Defendants' calculations and demands for interest on this note, Plaintiffs were charged interest of $119,232.67 to April 6, 1988 (Plaintiffs' Exhibit 3; Plaintiffs' Exhibit 7 and Soltow deposition, 3/20/91, Pp. 59 & 60). Further, using the Defendants' calculation of continuing interest at $206.17 per day, Attorney Austin calculated the interest demanded by Defendants of Plaintiffs from April 6, 1988 to August 25, 1988. Mr Austin brought the (13) figures to date for the renewal note of August 25, 1988 by multiplying the number of days since April 6, 1988 to the renewal on August 25, 1988 (Plaintiffs'

Exhibit 7 and Austin Deposition of 3/20/91, Pp. 62 & 63). Plaintiffs will now discuss the various ways in which the interest charged to Plaintiffs by Defendants on this note was illegal.

1. Defendants factually charged Plaintiffs an interest rate in excess of the interest rates set forth in the note.

The interest provided for in the note of July 8, 1986, is usurious. The interest charged to Plaintiffs by Defendants and demanded by Defendants from Plaintiffs was usurious and the renewal note of August 25, 1988 included these usurious interest charges. First, let's examine the interest actually charged to Plaintiffs by Defendants for the note of July 8, 1986. For purposes of this discussion, Plaintiffs assume arguendo that the interest rates set forth in the note are legal. (Plaintiffs will discuss the legality of the interest rates set forth in the note after this discussion on

the actual interest demanded from and charged to Plaintiffs by Defendants). An interest rate demanded and charged which is in excess of the amount set forth in the note cannot be legally allowed and is usurious.

Under MCL 438.31c(11), the parties can agree to any interest rate in writing for a real estate mortgage note. These parties agreed to 15% interest when not in default and 20% when the note was in default. No principal payments were due (14) until July 7, 1989. Interest payments were due every 6 months commencing January 7, 1987. Plaintiffs made no payments under this note. For purposes of this argument, Plaintiffs will assume that when Plaintiffs failed to make the first interest payment on January 7, 1987, Plaintiffs were in default of the note. With that assumption, Plaintiffs owed 15% interest from July 8, 1986 to January 7, 1987 and owed 20% from January

7, 1987 to the renewal note of August 25, 1988. The calculations are simple.

A. Interest due under the note.

(1) $350,000 at 15% interest from date of note, July 8, 1986, to when first interest payment was due, January 7, 1987, which is 183 days. $350,000 x 15% = $52,500 per year (divided by) 365 days = $143.84 per day X 183 days = $26,322.72.

(2) $350,000 at 20% interest from January 8, 1987 (first date interest was due and unpaid and assume for this argument that Plaintiffs are then in default). Since Defendants' calculations (Plaintiffs' Exhibits 3 & 7) calculate the interest owed to April 6, 1988, Plaintiffs will do same. January 8, 1987 to April 6, 1988 is 453 days. $350,000 at 20% per year is $70,000 in interest per year (divided by) 365 is $191.78 per day x 453 days = $86,876.34 in interest due January 8, 1987 to April 6, 1988. Amount that Defendants

should have demanded and charged Plaintiffs as of April 6, 1988 should have been:

$350,000.00	Principal
26,322.72	15% interest to 1/7/87
86,876.34	20% interest from 1/7/87 to 4/6/88
$463,199.06	(14)

B. Amount Defendants actually demanded and charged to Plaintiffs.

(1) According to Plaintiffs' Exhibits 3 & 7, which were prepared by Defendant Robert Soltow and Attorney Douglas Austin, Defendants demanded and charged to Plaintiffs as of April 6, 1988, the sum of $469,232.67.

(2) According to Plaintiffs' Exhibits 3 & 7, the Defendants were charging Plaintiffs $206.17 per day on this $350,000 loan. Even at 20%, the per day interest rate on $350,000 is $191.78 (calculations set out above). The $206.17 charge per day in interest is $21.5% interest. ($350,000 x 21.5% = $75,250 per year (divided by) 365 = $206.16 per day.)

C. Conclusion.

Even if the note of July 8, 1986 is not usurious, the demands and charges made by Defendants, purportedly pursuant to that note, are illegal and usurious.

D. Possible defenses that Defendants may raise:

(1) Defendants mistakenly compounded interest. Interest cannot be compounded. MCL 438.31c(9) provides:

> "(9) A mortgage loan or land contract made under this act shall not provide for a rate of interest added or deducted in advance and interest on the mortgage or land contract shall be computed from time to time only on the basis of its unpaid balances."

Further, under Michigan law, even when interest on interest was allowed, interest on interest could not be charged (16) where not specifically provided in a written agreement. Voight v Beller (1985) 56 Mich 40; 22 NW 270 and Hoyle v Page

(1879) 41 Mich 533; 2 NW 665.

(2) Defendants conduct is due to an innocent mistake and this usurious rate of 21.5% was not done intentionally.

The law in Michigan clearly provides that an innocent mistake does not excuse Defendants from their charging a usurious interest rate. Even if the usurious interest rate had been at the insistence of Plaintiffs, Defendants could not charge a usurious rate. The law does not recognize unintentional and innocent usury charges; nor, can Defendants raise the issue of estoppel to keep Plaintiffs from asserting usury. Bebee v Grettenberger (1978) 82 Mich App 416; 266 NW2d 829 and Osinski v Yowell (1984) 135 Mich App 279; 354 NW2d 318.

2. The note of July 8 did not authorize an increase to 20% until July 8, 1989.

Even if Defendants had just charged

Plaintiffs 15% interest on the whole $350,000 from July 8, 1986 to January 7, 1987 (the date the first interest payment was due) and then charged Plaintiffs 20% from then until the note of August 25, 1988, the Defendants would still be guilty of usury. The note of July 8, 1986 does not provide for an increase in interest from 15% to 20% unless there was default by Plaintiffs in making the first principal payment (a balloon payment of the (17) entire principal amount), which was due July 7, 1989. The note provides:

> ". . . with interest at the rate of fifteen percent (15%) per annun on the unpaid balance until paid and twenty percent (20%) per annum on the unpaid balance until paid during the period of any default herein.
> . . .
> The principal sum of $350,000 shall be due July 7, 1989. . ."

There was no intent and the note does not say that the interest rate will be increased from 15% to 20/% due to nonpay-

ment of just an interest payment. The usury statute makes it very clear that 5% is the maximum rate unless the agreement is in writing and the writing must clearly provide for additional interest rates under proper exceptions or exemptions. In addition, this note was prepared by Defendants and any ambiguity must be resolved against said Defendants.

Alternatively, the most the language could permit would be an increase from 15% to 20% on that portion of the note which is in default, which is only the interest payment. There was never a default on the principal payment because no principal payment was due until July 7, 1989. However, the Defendants' document (Plaintiffs' Exhibits 3 & 7) show that Defendants computed 20% interest on the principal and 20% interest on the interest payment that was due January 7, 1987.

3. <u>The note of July 8 was usurious</u>

on its face. (18)

In argument 1, under this real estate mortgage exception, Plaintiffs stated that for purposes of that argument Plaintiffs would assume the note as drafted was not usurious. Under argument 2 of this exception, Plaintiffs pointed out that the note did not permit an increase in the interest rate from 15% to 20% until and unless there was a default on the principal payment. If the Court concludes that the note as written permitted the Defendants to increase the interest rate from 15% to 20% on both principal and unpaid interest or just on principal, on January 1, 1987, when the first interest payment was not made, then it is Plaintiffs' position that the language that would permit that is usurious. MCL 438.101; MSA 19.21 provides:

> "438.101 Interest on due and unpaid interest; rate Sec. 1. That when any installment of interest upon any

note, bond, mortgage or other written contract shall have become due and the same shall remain unpaid, interest may be computed and collected on any such installment so due and unpaid, from the time at which it became due at the same rate as specified in any such note, bond, mortgage or other written contract, not exceeding 10 percent and if no rate of interest be specified in such instrument, than at the rate of 7 per centum per annum." (Emphasis supplied)

According to the computations set forth below, the Defendants calculated 15% on the principal amount through January 7, 1987. The Defendants calculated at 20% on the principal balance of $350,000 together with the interest to January 7, 1987 (as calculated by Defendants of $26,250) for a total of $376,250. These are the calculations that must have been made by Defendants: (19)

$350,000 x 15% = $52,500 x 1/2 year July 8, 1986 to January 7, 1987) = $26,250.

$376,250 x 20% = $75,250 (divided by) 365 days = $206.1643836 per day, which Defendants must have rounded up to $206.17

per day.

Defendants then continued to charge Plaintiffs 20% on that amount $376,250 ($206.17 per day) until the note of August 25, 1988. Therefore, after January 7, 1987, Defendants were charging Plaintiffs 20% interest on the principal and on the interest due on January 7, 1987.

a) The interest rate of 20% on the interest due on January 7, 1987 is usurious. MCL 438.101 makes it clear that the maximum interest that could be charged on interest is 10%. So assuming the language in the note authorizes interest on interest, the rate could not exceed 10% and Defendants charged 20%.

b) The 20% charged by Defendants against Plaintiffs on the principal would be usurious. Visoneering v Belle River (1986) 149 Mich App 327, 337, 286 NW2d 185, provides:

"MCL 438.101; MSA 19.21 permits

the computing of interest at a rate not exceeding ten percent (or the amount specified in the mortgage) on <u>any due and unpaid installments of interest, but not principal</u>." Emphasis supplied)

4. <u>Business purpos portion of $350,000 loan of July 8, 1986</u>.

Further, as pointed out earlier, $70,000 of the $350,000 loan was under the business purpose exception and would be limited to 15% interest. That being the case, the daily rate (20) charged by Defendants of 20% on $376,250 wuld be grossly usurious.

FACTUAL STATEMENT LEADING TO DOCUMENTS OF AUGUST 25, 1988

The only payment that Plaintiffs made to Defendants, on any of the above loans, was the $6,000 payment on loan #1 (Plaintiffs' Exhibit 2). The last loan was for $55,000 made on March 24, 1988, a note from Richard Fishell to R. Soltow (Plaintiffs' Exhibit 9). According to Defendant R.

Soltow this $55,000 loan was so Plaintiff R. Fishell could have the contractor finish the work on a storm drain located on the Andre property (Soltow Deposition, P. 65). In fact, the Andre property was property Plaintiff R. Fishell was buying that is adjacent to the property involved herein and the storm drain constructed by Plaintiff R. Fishell was really for the benefit of the subject property. Once the storm drain was completed all the utilities would be supplied to the subject property. The subject property has been appraised by an MAI, SREA appraiser as having a fair market value of $1,380,000 (Plaintiffs' Exhibit 12). This appraisal was contracted for by a potential purchaser dealing with Plaintiff R. Fishell. It would appear that Defendant R. Soltow placed a value on this property in November of 1989 of $1,500,000 (Plaintiffs' Exhibit 24, Lowe Deposition 2/20/91, Pp. 8 & 9). During the time that

Plaintiff R. Fishell was dealing with Defendant R. Soltow, Plaintiff R. Fishell had installed a $198,000 sewer project to extend the water and sewer along M-43 to the site and had constructed the storm drain mentioned above. Defendant R. Soltow was aware of all of this progress. Defendant R. Soltow never made any demand of Plaintiffs' default (21) on any of the notes #1 through #5, supra; and, on March 24, 1988 made the additional loan to Plaintiff R. Fishell of $55,000.

March 24, 1988, Defendant R. Soltow made the $55,000 loan to Richard Fishell. Defendant Robert Soltow never made any demand on Plaintiffs to cure any "defaults" on any notes to Defendants. Just after the $55,000 loan Plaintiff Richard Fishell had 12 lots on the Andre property which were just to the point where he could sell them. Defendant R. Soltow came to see Plaintiff R. Fishell and wanted to buy 5

lots for $100,000. Defendant Soltow knew Plaintiff was asking $28,000 for each of the lots and Fishell told Defendant he could not afford to take a $40,000 loss on these lots. Thirteen (13) days after this loan of $55,000 Defendant R. Soltow had his office personnel calculate what Defendant R. Soltow claims Plaintiffs owe him on the now 6 notes (Plaintiffs' Exhibit 3, showing calculations made as of 4/6/88). Then 23 days after that, on April 29, 1988, Defendant Soltow has attorney Douglas Austin write Mr. Fishell a letter that sets forth what Defendant Robert Soltow claims is due on each of the six notes as of April 6, 1988. The letter also says:

> "To the extent the obligations are demand obligations, or obligations due by a date certain which has passed, demand hereby made for full payment. To the extent they are installment obligations in default, default is hereby declared and acceleration elected." (Plaintiffs' Exhibit 7)

Unbeknownst to Plaintiffs, the plot

or scheme of Defendant R. Soltow is going into high gear. Defendant Soltow has been very friendly and very neighborly. Plaintiff R. (22) Fishell and Defendant R. Soltow had lunch together regularly, visited with each other constantly. Defendant Soltow loaned Plaintiff Fishell whatever money he needed to improve the property without ever demanding repayment. Defendant Soltow let Plaintiff Fishell get Plaintiff Fishells' property all prepared for sale or development. In February or March of 1988, just before Defendant Soltow loaned Plaintiff Fishell the $55,000, Defendant Soltow asked Plaintiff Fishell what he would take to sell the subject property to Defendant Soltow. Plaintiff Fishell answered that he was not interested in selling the property. Defendant Soltow then offered Plaintiff Fishell One Million Three Hundred Thousand to One Million Four Hundred Thousand for the subject property

and the Andre preperty. Further, Defendant Soltow offered to put Plaintiff Fishell on his payroll for two years. Plaintiff R. Fishell said he didn't work for anyone. He said he couldn't see himself being valuable to anyone because he had never worked for anyone. Plaintiff Fishell also told him he did not wish to sell. He had been working to development or sell the properties in sections and he wasn't dead yet and wanted to see it through.

At this time, Defendant Soltow had a mortgage for $350,000 on property that was worth at least $1,300,000. He wanted to buy it and had been rejected. There were no hard feelings expressed at that time. March 24, 1988, he had just loaned Plaintiff Fishell $55,000 to complete some utilities. Now without any mention to Plaintiff Richard Fishell in their (23) almost daily visits, Defendant r. Soltow has Attorney Austin send the above letter

demanding payment on all six notes.

It is significant to point out at this juncture that attorney Douglas J. Austin, a shareholder in the law firm of Fraser, Trebilcock, Davis & Foster, P.C. was Defendant Robert Soltow's attorney and was also Plaintiffs' attorney when he wrote his letter of April 29,1988. He had been Plaintiffs exclusive attorney since July, 1986. He represented the Plaintiffs on numerous matters and continued to bill Plaintiffs for legal services through April 20, 1989 and for costs and expenses as late as June 28, 1989. (See Plaintiffs' Exhibit 13, R. Fishell's Affidavit, and Plaintiffs' Exhibit 14, statements for services rendered by Austin to Plaintiffs, which were submitted in Eaton County Circuit Court in support of Plaintiffs' motion to disqualify the Fraser law firm from representing Defendants in this matter.)

Then on August 12, 1988, Attorney Austin sent a letter to Plaintiffs (which

salutation said: Dear Dick and Dorothy, Plaintiffs' Exhibit 15). The letter included the following:

(1) A proposed land contract covering the subject property. Defendant R. Soltow was the vendor and Plaintiffs were the vendees. The purchase price was $613,683.64, which was suppose to be the outstanding indebtedness on the six loans owed from Plaintiffs to Defendants, with the usurious interest calculated to 8/16/88 (the proposed land contract is Plaintiffs' Exhibit 16); (24)

(2) The letter advised the Plaintiffs that they would have to sign a warranty deed to Soltow and Soltow would sign a discharge of mortgage and would cancel the six notes. The Plaintiffs would also have to sign a business purpose affidavit;

(3) This transaction was suppose to be in lieu of the mortgage note and other outstanding obligations;

(4) The land contract was to be at 15% interest and was due to be paid in full September 30, 1988, which was only 45 days after the land contract was to be signed on August 16, 1988;

(5) Austin also advises the Plaintiffs will gain more time to pay off Defendant by this approach and them provides the Plaintiffs with some very interesting, but disturbing, legal advise. Of course, this advise comes from Attorney Austin who, according to his testimony, specializes in real estate law, including foreclosures (Austin Deposition 3/20/91, P. 47). The letter states:

> "As discussed, if the land contract is not paid by the end of September, Bob will, through us, mail a 15-day notice of forfeiture to you. If, within the 15 days, the contract is not paid, we will start a forfeiture action in District Court, which will have a 90-day redemption period. This would mean the property would become Bob's at approximately the end of January, 1988 unless re-

deemed. This is actually a month longer than you would have had under mortgage foreclosure, assuming we had published in June, with a sale in early July with six-month redemption period." (Emphasis supplied) (25)

When Plaintiffs received this information, they relied on the accuracy of the representations made in the letter and in the proposed land contract (Eaton County Transcript of 2/27/90, Pp. 59 & 60. There were at least two very significant representations that were made that were incorrect. The first was that the Plaintiffs were indebted to Defendants for $613,683.54, without disclosing to Plaintiffs that the interest charges were usurious; and (2) that if Austin had, on behalf of Defendants, commenced foreclosure by advertising back in June the Plaintiffs' redemption period would have run prior to the end of January, since there is only a 6 month redemption. Ignore that Austin is representing that the redemption time would

have run before the end of January if advertising had been in June, which it had not been and this was August. Ignore that if there was a six month redemption period and if Attorney Austin commenced advertising by August 15, there could not have been a sale held until at least September 15 (MCL 600.3208; MSA 27A.3208) causing Attorney Austin's six month redemption period to expire March 15, 1989. The real serious problem with Attorney Austin's misrepresentations is the misrepresentation that Plaintiffs only had a six month redemption in a foreclosure by advertising. This is patently inaccurate. The subject property is approximately 43 acres in Oneida Township, Eaton County. In 1986 when the mortgage was given and in 1988 when this letter was written the property was farm land. Plaintiff R. Fishell bought the subject property in 1985 and it had a crop of soy beans on it (26) when Plaintiff

R. Fishell purchased it. The owner of the land retained ownership of the crop of soy beans. In 1986 Plaintiff Fishell had a crop of oats planted on shares on said property. In 1987 the farm land was idle because Plaintiff R. Fishell had to construct a drain on the subject property. The farm was also idle in 1988. There was a crop of white beans grown on it by farmer Huhn in 1989 or 1990. MCL 600.3240; MSA 27A.3240 sets forth the redemption periods for foreclosure by advertising and the applicable section is secton (8), which provides:

> "(8) In any other case, the redemption period shall be 1 year from the date of sale."

Therefore, had Attorney Austin commenced foreclosure by advertisement August 15, 1988, Plaintiffs would have had until approximately September 15, 1989 to redeem. Further, they could have challenged the usurious interest had Attorney Austin ad-

vised them that it was usurious.

The land contract that was proposed to Plaintiffs by letter of August 12, 1988 was never executed. Attorney Austin testified that the land contract proposal was withdrawn because he advised his client Defendant R. Soltow that it would not work (Austin's deposition of 3/20/91, P. 47).

AUGUST 25, 1988 TRANSACTION

The next thing that occurs is Attorney Austin has Plaintiffs and Defendant R. Soltow meet a Defendant R. Soltow's office to sign the infamous documents of August 25, 1988. It should first be noted that Attorney Austn did not tell the (27) Plaintiffs that he was not looking out for their interests (Eaton County Circuit Court transcriptof hearing, 2/27/90, R. Fishell - Pp. 45 & 46; Mrs. Fishell - Pp. 112-115; Defendant R. Soltow deposition 3/20/91, Pp. 78 & 79). The documents that were prepared by Attorney Austin and presented to the

parties for signature, without any explanation to Plaintiffs, which were signed on August 25, 1988, were:

1. Amended Promissory Note, $610,446.14 (Plaintiffs' Exhibit 17); This note was at the interest rate of 15%. It states "This note replaces the note dated July 8, 1986 given by the undersigned to Robert Soltow in the principal amount of $350,000";

2. Mortgage Modification Agreement (Plaintiffs' Exhibit 18). It amends the mortgage of July 8, 1986 from $350,000 to $610,446.14 and provides:

> "The mortgage shall continue in full force and effect and except as above specifically modified and amended the mortgage shall be unamended, unchanged, and unmodified by this agreement and shall continue to secure to mortgagee the repayment of mortgagor's indebtedness or other obligations to mortgagee."

3. Escrow Holding Agreement (Plaintiffs' Exhibit 19). This sets forth the

six loans from Defendant Soltow to Plaintiff Fishell, says they are all in default, claims Defendant Soltow has accelerated all of them and states the balance on all six notes to be $610,446.14. It states the current balance on the $350,000 note of 7/8/86 to be $498,302.64 and the balance owing on the other notes, as accelerated, is $112,093.50. It also (28) covers the other documents that are being executed at that time. It provides that Plaintiffs will provide a warranty deed to the subject property to Defendant, which will be held in escrow along with a discharge of mortgage from Defendant R. Soltow to Plaintiffs. If Soltow notifies the escrow agent the note is paid, Plaintiffs will receive the discharge of mortgage and get back their warranty deed. If Soltow advises the escrow agent the note is in default, the discharge of mortgage and the warranty deed will be delivered to defendant R. Soltow.

4. Warranty Deed on the subject property from Plaintiffs Fishells to Defendant R. Soltow (Plaintiffs' Exhibit 20). The deed signed by the Fishells provides:

> "This deed is given in lieu of foreclosure of the mortgage recorded in Liber 707, Page 630, Eaton County Records. This conveyance shall not operate as a merger of Grantee's interest as the mortgagee under the previously described mortgage with Grantee's title acquired under this conveyance."

5. Declaration of Storm Drain (Plaintiffs' Exhibit 21). Plaintiffs Fishells were purchasing property contiguous to the subject proeprty over which Plaintiff R. Fishell had constructed a storm drain basically for the benefit of the subject property. This document gave the subject property a permanent easement over the contiguous property. It also provides that Fishells shall bear the cost of maintaining the drain "until such time, if at all, that Robert Soltow, his heirs, assigns or perso-

nal representatives take title to parcel one through fore-(29)closure or through deed in lieu of foreclosure." (Emphasis supplied).

6. Discharge of Mortgage - Signed only by Defendant R. Soltow (Plaintiffs' Exhibit 22). All these executed documents, except the promissory note were mailed to Plaintiffs by Attorney Austin on August 26, 1988 (Plaintiffs' Exhibit 23). Attorney Austin testified that in arriving at the $610,446.14 indebtedness placed on the amended note of August 25, 1988, he made the calculations. He referred to Plaintiffs' Exhibit 3 (Soltow Deposition Exhibit 10) and used the per diem interest rate for each loan and brought current the balance on each note (Austin Deposition 3/20/91, P. 64). That means Austin continued to apply the usurious rates of interest on each of the six loans, as discussed in detail above, including the per diem of

$206.17 on the $350,000 loan. As shown earlier $206.17 per day on $350,000 is 21.5% interest. Therefore when the amended note was prepared and executed on August 25, 1988 for $610,446.14, it included all the usurious interest charges on all six loans.

DID DRAFTING A RENEWAL NOTE ON AUGUST 25,1988 AFFECT THE USURIOUS INTEREST CHARGED ON THE SIX (6) LOANS?

The law in Michigan is firmly established that since the amended note of August 25, 1988 includes usurious interest charges, it continues to be usurious. It isn't even necessary to examine or review whether the interest rate charged in the amended note of August 25, 1988, being 15%, is usurious. The (30) Michigan law is set forth in Mathews v Tripp (1938) 285 Mich 705, at 710; 281 NW 412, wherein the Court in quoting the Restatement of the Law of Contracts says as follows:

"In 2 Restatement of the Law

of Contracts, S535, it is said: 'Where a bargain is usurious, an agreement in renewal thereof, or in substitution therefor, which provides for a payment that includes the the usurious interest is also illegal, although no excessive interest is promised from the date of the renewal or subsititution.'"

Also, on Page 710 of the Mathews case, supra, the court further elaborated on the law in Michigan as follows:

"'It seems to be the rule that the general principle determining when an indebtedness infected with usury is to be deemed disinfected that if the tainted obligation is, with full knowledge and consent of the borrower finally canceled or abandoned, and a new obligation, containing no part of the usury, is executed in legal form, and supported solely by the moral obligation resting upon the borrower to pay the money actually received with legal interest thereon, such new obligation is valid and enforceable. * * * Carr v. Taylor, 30 Misc. Rep. 617 (62 N.Y. Supp. 849); 30 Cyc. p. 1002; Gladwin State Bank v Dow, 212 Mich. 521 (13 A.L.R. 1233).' Union Guardian Trust Co. v Craw-

ford, 270 Mich. 207.
'If a transaction is usurious in its inception, it remains usurious until purged by a new contract; and all future transactions connected with or growing out of the original are usurious and without valid consideration. An original taint of usury attaches to the whole family of consecutive obligations and securities growing out of the original vicious transaction; and none of the descendant obligations, however remote, can be free of the taint if the descent can be fairly traced.' Webb on Usury, S308.

See, also, Gladwin State Bank v Dow, 212 Mich. (31) 521 (13 A.L.R. 1233).
As said in Continental National Bank of Chicago, Illinois v Fleming, 170 Mich. 624, 643:
'If the transactions on account of which the indebtedness was incurred were tainted with usury, its effect cannot be avoided by taking other paper or security for the indebtedness, including the usurious charge.'"

The case law in Michigan describes the Fishell/Soltow transactions. Every one of the six promissory notes entered into between the parties was at a usurious in-

terest rate. When the notes were consolidated into the amended promissory note of August 25, 1988, the figure for the amended note was arrived at by adding up the principal amounts loaned by Defendant Soltow to Plaintiff Richard Fishell and adding to that all the interest at the various usurious interest rates.

SUMMARY ON USURIOUS INTEREST CLAIMS

The facts set forth by Plaintiffs concerning the usury issue are not disputed. The interest rate charged by Defendants on each of the six loans are set forth in documents prepared by either the Defendant or the Defendant's attorney. Plaintiffs are entitled to summary judgment on the usury issues. This has several results, which are as follows:

1. Defendants are barred from the recovery of any interest, any official fees, delinquency or collection charge, attorney's fees or court costs. MCL 438.32,

supra; (32)

2. The documents signed on August 25, 1988, are of no effect or consequence. Mathews v Tripp, supra, wherein the Court said as follows:

> "If a transaction is usurious in its inception, it remains usurious until purged by a new contract; and all future transactions connected with or growing out of the original are usurious and without valid consideration."

3. Plaintiffs are not and never have been in default of the $350,000 promissory note dated July 8, 1986, or the mortgage given as security for said note. As was pointed out, supra, the note provided for no principal payments until July 7, 1989. Only interest payments were due prior to July 7, 1989 and they were due every six months commencing January 7, 1987 (Plaintiffs' Exhibit 5).

Therefore, when Attorney Austin wrote the demand letter for Defendants Soltow on April 29, 1988, the note and

mortgate of July 8, 1986 were not in default. Likewise, when Attorney Austin threatened forfeiture on behalf of Defendant Robert Soltow against Plaintiffs, in his letter of August 12, 1988 (Plaintiffs' Exhibit 15) and enclosed a proposed land contract, Plaintiffs, were not in default of the promissory note and mortgage dated July 8, 1986. Further, when Defendants and Attorney Austin had Plaintiffs sign the documents on August 25, 1988, Plaintiffs were not in default of the note and mortgage of July 8, 1986. Plaintiffs were not in default of the note and mortgage of July 8, 1986, because at all those times mentioned (33) the only payments that had been due from Plaintiffs to Defendants on said note were interest payments. The only demand or charge the Defendants made against Plaintiffs for interest on the $350,000 promissory note were usurious charges and demands. Therefore, Defendants were not

entitled to collect any interest on that $350,000 promissory note and with no interest payments collectible, there was no default on the note or mortgage.

4. All of the documents signed by Plaintiffs on August 25, 1988 are null and void. Since no payments were due from Plaintiffs to Defendant on the $350,000 note, there was no default on that note and mortgage. Therefore, since there was no default and in light of the language in Mathews v Tripp, supra, there was no consideration for these documents that were signed on August 25, 1988.

5. Defendant Robert Soltow's remedies are as follows:

(a) Defendant Robert Soltow has an unsecured claim against Plaintiffs for the sum of $4,000 on note #1, dated April 23, 1982 (Plaintiffs' Exhibit 1), because under the cases cited above, any payment made on that note must be deducted as a principal

payment and since the Plaintiffs paid $6,000 on November 13, 1983, there is only a $4,000 balance owing. $4,000 in principal and no interest is collectible.

(b) Defendant Robert Soltow has an unsecured claim against Plaintiff R. Fishell for $6,250, on loan #2, being the (34) principal amount of the loan of January 29, 1986 (Plaintiffs" Exhibit 4);

(c) Defendant Robert Soltow has a claim against Plaintiffs for $350,000, being the principal amount of the loan of July 8, 1986. This loan is collateralized by a mortgage on the real estate which I presume that Defendant Robert Soltow could argue that he is entitled to commence foreclosure of that mortgage.

(d) Defendant Robert Soltow has an unsecured claim against Plaintiffs for $10,000, being the principal amount of the loan of July 16, 1987 (Plaintiffs' Exhibit 6).

(e) Defendant Robert Soltow has an unsecured claim against Plaintiffs in the amount of $25,000, being the principal amount of the loan of September 3, 1987 (Plaintiffs' Exhibit 8).

(f) Defendant Robert Soltow has an unsecured claim against the Plaintiff Richard Fishell for $55,000, being the principal amount of the loan of March 24, 1988 (Plaintiffs' Exhibit 9).

To summarize, Defendant Robert Soltow has an unsecured claim against Richard Fishell only on loans 2, and 6 for an amount that totals the principal amount of each of those loans, being $61,250. That Defendant R. Soltow has an unsecured claim against both Plaintiffs on loans 1, 4 and 5 for an amount that (35) totals the principal of those loans, less the $6,000 payment on the first loan, giving a total unsecured claim against both Plaintiffs in the amount of $39,000. Defendant Robert

Soltow has a secured claim against both Plaintiffs and against the subject property for $350,000, being the principal amount of that loan.

6. Plaintiffs shall recover their attorney's fees and court costs from Defendants. (MCL 438.32, supra.

RELIEF

Plaintiffs therefore, under the usurious interest claims, respectfully request this Court to issue a summary judgment for Plaintiffs and against Defendants as set out in this summary. (36)

FACTUAL STATEMENT CONCERNING AUGUST 25, 1988 DOCUMENTS AND EVENTS SUBSEQUENT THERETO.

In order to induce the Plaintiffs to execute the documents of August 25, 1988, Defendant Robert Soltow and Attorney Austin made certain representations to Plaintiff Richard Fishell, including but not limited to:

1. The public as well as any people

that Plaintiff would be dealing with on selling or developing the property would not receive any notice or be aware of the dealings between Plaintiff and Defendant concerning said documents, other than the mortgage modification agreement which Defendant Robert Soltow would record;

2. That said transaction, other than the recording of the mortgage modification agreement, would be kept confidential at least until February 15, 1989. That if the indebtedness was not paid by Plaintiff to Defendant by February 15, 1989, then the deed that was being placed in escrow could be recorded by Defendant Robert Soltow;

3. In a letter dated August 12, 1988 (Plaintiffs' Exhibit 15), from Attorney Austin to Plaintiffs, Attorney Austin advised Plaintiffs they were in default on the $350,000 note of July 8, 1986, as well as the five other loans. Further that under a mortgage foreclosure Plaintiffs'

redemption period would expire prior to the end of January, 1988 (sic). Therefore, Plaintiffs would benefit from signing the proposed land contract because it would give Plaintiffs more time to develop or sell (37) the property and Plaintiffs would avoid any public knowledge that would be brought about by advertising the foreclosure. The land contract approach was dropped by Austin;

4. Then Attorney Austin advised Plaintiff Richard Fishell that if Fishells signed the new set of documents on August 25, 1988, and did not pay off the loans by February 15, 1989, that Defendant Soltow could record the deed that Plaintiffs were placing in escrow. However, Plaintiff R. Fishell was advised by Attorney Austin and understood that the deed was just additional protection for Defendant R. Soltow; that what Defendant R. Soltow had was a mortgage on the property for the increased

amount; and, if Defendant Soltow wanted to get title to the land he would have to foreclose after February 15, 1989, and then Fishell could redeem the property after said foreclosure;

5. Attorney Austin advised Plaintiff R. Fishell and Plaintiff R. Fishell understood that if Plaintiffs did not pay Defendant R. Soltow by the end of any redemption period which would run after a mortgage foreclosure susequent to February 15, 1989, then Defendant R. Soltow would have title to the property;

6. Defendant Robert Soltow represented to Plaintiff Richard Fishell that he just wanted his money repaid and there was a verbal representation made from Defendant R. Soltow to Plaintiff R. Fishell that Plaintiff, Richard Fishell, would be allowed to treat the property as his own and to sell same without any hinderance from Defendant even after the February (38)

15, 1989 date set forth in the escrow holding agreement;

7. That if the indebtednesses were not paid by February 15, 1989, and if Defendant Robert Soltow caused the deed that was placed in escrow from Fishell to Soltow to be recorded, that Plaintiff Richard Fishell could continue to treat the property as his own and to sell same without any hinderance from Defendant. It being represented to Plaintiff R. Fishell by Defendant R. Soltow that he just wanted Fishell to get a chance to either develop or sell the property and pay him what was owed.

The above representations made by Defendant R. Soltow and Attorney Austin were inaccurate and untrue.

That Plaintiffs believed and relied upon said representations in signing the documents on August 25, 1988. That Plaintiffs were deceived by said representations

to their detriment in that:

(1) Plaintiffs believed that they were getting really unlimited time to sell and/or develop their property;

(2) Plaintiffs believed Defendants would do nothing to hinder Plaintiffs ' efforts;

(3) Plaintiffs believed that Plaintiff Richard Fishell would be able to continue his efforts to either sell and/or develop said property without hinderance from Defendant even after February 15, 1989;

(4) Plaintiffs believed Defendants were just taking the deed in escrow as additional security for the indebtedness;

(39) (5) Plaintiffs believed that Defendant R. Soltow just wanted to consolidate the loans and be paid on same.

(6) Plaintiffs accepted Austin's representations that the amount owed on all six loans with legal interest was

$610,446.14.

When the above representations were made, Plaintiffs were in privy with the Defendant Robert Soltow in the transactions of August, 25, 1988. Plaintiff was deceived by the representations into signing the documents of August 25, 1988. Defendant R. Soltow has now taken the position that he is the owner of the subject property. Plaintiff has suffered injury and damage due to said misrepresentations, including but not limited to the following:

(1) Defendant Soltow claims to be the owner of the property;

(2) The Property has a value of at least $1,380,000;

(3) Defendant R. Soltow has filed a deed and has informed Plaintiff R. Fishell that Fishell no longer has an interest in the property, except the same right to sell the property as any real estate person would have (R. Soltow's Deposition 3/20/91,

P. 107);

(4) Prior to signing the documents of August 25, 1988, all Plaintiffs owed Defendant R. Soltow on the note and mortgage on said property (transaction of July 8, 1986) was $350,000;

(5) That after the August 25, 1988 transaction with the other five notes consolidated into th amended promissory (40) note of August 25, 1988, together with all the usurious interest on all six loans, the indebtedness which was secured by the mortgage on the subject property rose to $610,446.14. Further that Defendant R. Soltow claimed that that indebtedness continued to increase by at least 15% per year.

That the damages to Plaintiffs by Defendant Soltow's and Attorney Austin's misrepresentations have inured to the benefit of Defendants because they are claiming ownership of th subject property which is

worth at least $1,380,000 by actually loaning $350,000 to Plaintiff R. Fishell, for which Defendant R. Soltow took the subject property as security.

Not only were the foregoing representations false when made by Defendant R. Soltow and/or Attorney Austin, but they were known to be false when made or were made in a reckless manner, without any knowledge of their truth and as a positive assertion. That when the representations were made by Defendant Soltow and Attorney Austin they were made with the intention that the representations would be acted upon by the Plaintiffs. As above stated, Plaintiffs in fact relied upon such representations, did act upon said representations and Plaintiffs thereby suffered injuries as set forth above.

Defendant Robert Soltow did not intend, at the time of making the representations or at the time Attorney Austin made

the representations, and does not now intend to perform as agreed, as evidence by: (41)

1. The Defendant and Attorney Austin, from and after August 25, 1988, represented to others dealing with the property, including local governmental officials, that Plaintiff Richard Fishell need no longer be dealt with respecting the subject property;

2. Defendant R. Soltow could not have foreclosed on the mortgage and had the redemption period expire prior to the end of January, 1980;

3. Defendant R. Soltow and Attorney Austin caused and Affidavit prepared and signed by Attorney Douglas Austin to be filed on February 7, 1980, with the Register of Deeds. This Affidavit advised the world that by February 15, 1980, Plaintiffs would have no interest in the subject property (Plaintiffs' Exhibit 25);

4. In April, 1989, Attorney Austin prepared and Defendant R. Soltow delivered to Plaintiffs at Plaintiffs' residence a document entitled "Amendment to Note and Escrow Holding Agreement." This document was delivered by Defendant Soltow to Plaintiffs at their residence on April 20, 1989. the document was prepared so that it was purported to have been an agreement of February 15, 1989. The document, among other things, attempted to terminate the verbal agreement that Defendant Soltow had with Richard Fishell regarding the fact that the documents of August 25, 1988 were really security documents and that Fishell could continue to treat the property as his own (42) regarding the development and sale of same. The document (Plaintiffs' Exhibit 26) basically provided as follows:

1. The maturity date of the amended promissory note was extended from February 15, 1989 to March 15, 1989;

2. <u>If</u> Soltow obtains title to the

premises through delivery of the warranty deed from the escrow agent Soltow agrees to reconvey title to Fishells at any time from March 16, 1989 to and through April 24, 1989, in exchange for the payment by Fishells of the $700,000 plus $300 per day from March 16, 1989;

3. The reconveyance from Soltow to Fishell shall be in the form of Exhibit F which was attached to the letter;

4. At the time of reconveyance Soltow shall also deliver to Fishells the mortgage discharge;

5. Defendant Rosalee Soltow joins in this agreement solely for the purpose of consenting to the release of her dower interest in the premises by executing the warranty deed;

6. "This agreement constitutes and merges all of the agreements between the parties arising since August 25, 1988, relative to the escrow holding agreement and the premises and no agreements hereafter arising shall be binding unless in writing and signed by Soltow and Fishells."

7. Except as otherwise amended by the foregoing, this escrow holding agreement shall remain in full force and effect."

This document shows that Defendant R. Soltow and Attorney Austin recognized that all Defendant R. Soltow had was a security agreement. It further recognized that

Plaintiffs were owners of the property and could dispose of same. It recognizes if the documents on their face did not so provide, (43) that Defendant Soltow had verbally agreed to same. Paragraph 6 of the agreement was an attempt to terminate that verbal understanding and eliminate Plaintiffs' continuing interest in the property by April 24, 1989 (four days from the date the document was delivered to the Plaintiffs). Not only was it obvious from this document that there was at least a verbal understanding that Plaintiffs were still the owners of the property after February 15, 1989, it was also obvious there was such a verbal understanding from other documents (Plaintiffs' Exhibits 27, 28 and 29). Those documents are as follows:

1. Plaintiffs' Exhibit 27 is a letter from Robert Soltow to Mr. Leroy D. Scott, First Vice President of Manufacturers Bank in Lansing. The letter is dated February

14, 1989 (but not sent until 2/21/89-see #2 below), and says as follows:

> "I am the holder of a mortgage on 44.319 acres, more or less, in Oneida Township, Eaton County, Michigan, title which is held by Mr. and Mrs. Fishell. I understand from a copy of the February 10, 1989 commitment letter which the Fishells have provided to me, that you will be making a loan for the purpose of paying off this mortgage.
>
> The mortgage has a balance of $652,341.14 as of February 7, 1989, plus per diem interest thereafter at the rate of $250.8682." (Emphasis supplied)

2. Plaintiffs' Exhibit 28 is a letter dated February 21, 1989, from Attorney Austin to the same Mr. Scott, which enclosed the above letter of February 14, 1989 from Defendant Soltow and also enclosed a copy of a discharge of mortgage (44) (Plaintiffs' Exhibit 28A) which Austin would tender the original of at the closing. Mr. Austin asked for a closing date.

3. Plaintiffs' Exhibit 29 is a letter from Austin to Mr. Scott dated March 16,

1989. Also on March 16, 1989, Defendant R. Soltow had caused Austin to have the deed from Plaintiffs to R. Soltow taken out of escrow and recorded in Soltow's name (Plaintiffs' Exhibits 30 & 31). However, Defendant R. Soltow and Austin continued to recognize that Defendant Soltow merely had a mortgage and Plaintiffs were able to sell the property and pay off the mortgage. This is demonstrated by Plaintiffs' Exhibit 29. This letter advises the bank that the pay off figures set forth in Defendant R. Soltow's letter to Mr. Scott on February 14, 1989 (Plaintiffs' Exhibit 27) had expired as of March 15, 1989. The letter requested that Mr. Scott contact Mr. Austin should any closing be scheduled in the future.

When Defendant R. Soltow delivered the proposed amendment to note and escrow holding agreement to the Fishells on April 20, 1989 (Plaintiffs' Exhibit 26), which

attempted to terminate Plaintiffs' interest in said property as of April 24, 1989, Plaintiff R. Fishell became very concerned. Plaintiff R. Fishell tried to talk to Defendant R. Soltow on that occasion and Defendant R. Soltow was very evasive. Defendant R. Soltow would not sit down and visit, Defendant R. Soltow was acting very quiet and very unusual. Defendant R. Soltow had never delivered any papers from Austin before. Attorney Austin had called and said Austin had some papers for Plaintiffs to sign (45) and Defendant R. Soltow was at Austin's and Austin would send the papers out by Defendant R. Soltow. Plaintiff Fishell walked Defendant Soltow out to his car and asked Defendant Soltow "can't you talk?" Defendant Soltow's response was either "No, not much" or "No, not very well." Plaintiff R. Fishell did not sign the proposed document. However, because of the language in the document;

because of Defendant's actions or attitude at Fishell's house on April 20, 1989; because now that Defendant Soltow had filed the deed and could not convey back the property without Defendant Rosalee Soltow's signature; and, because of the other things that had transpired (including the meeting called for by Austin that had been held on April 5, 1989, between Austin, his law partner Lowe and Plaintiff R. Fishell), seven (7) days later on April 27, 1989, Plaintiff Richard Fishell filed this lawsuit.

If Defendant R. Soltow or Attorney Austin had made proper representations to Plaintiff R. Fishell, Plaintiff Richard Fishell and Plaintiff Dorothy Fishell, would never have signed the documents on August 25, 1988. Plaintiff Richard Fishell just thought he was being fair in giving Defendant Soltow additional collateral and putting all the debts into the

collateralized note and then Plaintiffs could avoid any advertising for foreclosure and be able to develop the property or sell same without any time pressure. Plaintiff Richard Fishell thought the real purpose of the documents of August 25, 1988 was to collateralize the other loans. If Plaintiff Richard Fishell (46) had known what Defendant Soltow and Attorney Austin would end up doing, what they did; or, if Plaintiff Richard Fishell had known about the usurious interest rates, the documents of August 25, 1988 would not have been signed. Plaintiff Richard Fishell had a big hang up that the advertising of any economic pressure on him would greatly adversely affect any deal he might have then, or in the future, regarding developing or selling the subject land. Of course, all of this has been defeated because of the Affidavit filed by Austin on February 7, 1989, and the filing of the deed by De-

fendant R. Soltow on March 16, 1989. What has happened to the Plaintiffs as a result of Defendant Soltow's misrepresentation, Attorney Austin's misrepresentation and both Austin's and Soltow's conduct is much worse than the publicity of a foreclosure advertisement. Soltow is claiming he owns Plaintiffs' property; Plaintiffs have to litigate to have their property and Plaintiffs have been forced to file for relief in the bankruptcy court, which has been devastating to both Plaintiffs.

If Plaintiffs had only known, they could have avoided all of this. Plaintiff would have sold all or part of the subject land for a price less than $1,300,000 and/or used other assets to pay off Defendant Soltow. Plaintiffs would not lose property worth at least $1,300,000 for a $350,000 loan. (47)

Response to Testimony Relied Upon by Defendants in their Brief in Support of

Motion for Summary Judgment

In response to Defendants' Brief in support of their Motion for Summary Judgment, it shold be noted that Defendants rely primarily on the testimony taken before Circuit Judge Eveland on Plaintiffs' Motion to Disqualify the Fraser firm from representing Defendants. There has never been a hearing on the merits of the case before Judge Eveland and so the testimony relied upon by Defendants from those hearings is very limited. Further, what they have presented to the Court is not accurate from the whole transcript of the two hearings.

Although Defendants spent a great deal of time pointing out that Judge Eveland did not think the Fraser firm should be disqualified, Plaintiffs will not belabor those conclusions by Judge Eveland, since that is not the issue presently before this Court. Plaintiffs will only point out to

the Court that Plaintiffs' appeal to the Michigan Court of Appeals and to the Michigan Supreme Court were on an interlocutory order and the appeals were by application for leave and not as a matter of right. The Courts merely declined to hear the appeals at that time. However, the Court of Appeals decision to decline hearing the appeal was a 2-1 split with Judge Kelly voting to grant leave to appeal, grant motion for stay and take the motion for peremptory reversal under advisement (Defendants' Exhibit I). It should also be pointed out that Judge Eveland said: "The Court also has searched the record for any information that (48) Austin obtained within his confidential relationship with Soltow (sic) that would prejudice Soltow (sic) in this case." The Court when on to say:

> "I find no basis to believe that there was a reasonable probability that confidences were disclosed

> which could be used against Fishell. In order to find that there was a probability the Court would have to conclude that Fishell believed that Austin represented him and not Soltow on the mortgage transaction. The evidence offered is insufficient and non-credible." (Defendants' Exhibit H).

The Court concluded that he could find no breach of professional ethics by the Fraser firm in representing the Defendants and accordingly denied the motion. It is of note that prior to Judge Eveland's decision Eaton County Circuit Judge Shuster granted a similar motion by Fishells to disqualify the Fraser firm from representing Mr. Soltow in another case pending in Eaton County that involved Fishell and Soltow, "In the Matter of the Complaint of the Eaton County Drain Commissioner for the Condemnation of Private Property for the Reed Drainage District in Oneida Township, Eaton County, Michigan," Docket No. 89-377-CC.

The first hearing date on Plaintiffs'

Motion to Disqualify the Fraser firm was October 4, 1989, and it was continued on February 27, 1990. These were not hearings on the merits and the Judge advised the attorney for Plaintiffs to only deal with the disqualification issue and not the merits of the case (Tr. 10/4/89, Pp. 61, 78; Tr. 2/27/90 Pp. 84, 85, 93, 94). (49) So when Defendants' counsel points out testimony that was obtained from Plaintiff Fishell that dealt with the merits, the record is very limited. However, that transcript does support Plaintiff Fishell's position in numerous aspects, including (Tr. 2/27/90):

1. Plaintiff Fishell was concerned when he received the April 29, 1988 letter from Attorney Austin demanding payment on the notes and thratening mortgage foreclosure (Plaintiffs' Exhibit 7, Tr. P. 61);

2. Plaintiff Fishell relied on Attorney Austin as to what he should do to avoid any advertising of said foreclosure and followed Attorney Austin's advice on signing the papers on August 25, 1988

(Tr. Pp. 60 & 61);

3. Plaintiff Fishell relied on Attorney Austin's advice set forth in Austin's letter of August 12, 1988 (Plaintiffs' Exhibit 15), that Plaintiffs would only have a six month redemption period that would expire prior to the end of January (Tr. Pp. 59 & 60);

4. That Attorney Austin did not explain the pros and cons of signing the "renewal" documents on August 25, 1988 (Tr. P. 59);

5. That Attorney Austin did explain to Plainiff Fishell that if Fishells signed the documents on August 25, 1988 that the sole benefit Fishells would receive is that they would avoid advertising (Tr. P. 23 & 73);

6. That Attorney Austin did not tell Plaintiff Fishell what the benefits of the August 25, 1988 documents were to Defendant Soltow (Tr. P. 73);

7. That Attorney Austin represented to Plaintiff Fishell that if Fishells signed the documents on August 25, 1988 that Defendant Soltow would still have to foreclose on the mortgage and Plaintiff Fishell would be able to buy it back during the redemption period (Tr. Pp. 62, 63); (50)

8. That Plaintiff Fishell undertood when he signed the documents on August 25, 1988 that if Plaintiff Fishell did not pay Defendant

Soltow would receive a deed to the property (Tr. P. 68);

However, Plaintiff Fishell also understood that the deed was just additional protection and what Defendant Soltow had was a mortgage on the property for the increased amount; and, if Soltow wanted to get title to the land he would have to foreclose and Fishell could redeem (Tr. Pp. 67, 68, & 63);

9. Plaintiff Fishell understood that if Soltow did foreclose on the deed and mortgage after February 18, 1989 and if Plaintiff Fishell did not redeem during the redemption period, that at the end of the redemption period Plaintiff Fishell would lose the land (Tr. P. 63);

10. That even after the deed was taken out of escrow, given to Defendant Soltow and recorded, Defendant Soltow kept telling Plaintiff Fishell to sell the property and pay off Soltow's loans, "All I want is my money" (Tr. P. 64);

11. That Attorney Austin never told either Plaintiff that he was not looking out for their interest when the documents of August 25, 1988 were signed and never suggested to them that they should have another attorney review the documents or advise them (Tr. Mr. Fishell, P. 46 60; Mrs. Fishell, P. 114 & 115);

12. Attorney Austin testified that he knew Plaintiff R. Fishell felt he had an attorney/client relationship with Austin; and that Plaintiff R. Fishell had confidence and trust in Attorney Austin (Tr. 10/4/89, P. 106);

13. Attorney Austin nor Defendant Soltow ever explained the usurious interest rates being charged by Soltow to Fishell on all six notes when they were consolidated into one with the amended note of August 25, 1988 (Tr. 10/4/89, P. 106; also see Austin's Deposition of 3/20/91, P. 59). (51)

ARGUMENT

THE DEFENDANT R. SOLTOW'S AND ATTORNEY AUSTIN'S MISREPRESENTATION, CONDUCT AND FAILURE TO DISCLOSE CERTAIN FACTS CONSTITUTED ACTUAL FRAUD, INNOCENT MISREPRENTATION, AND SILENT FRAUD.

United States Fidelity and Guaranty Co v Black (1981) 412 Mich 99; 313 Nw2d 77 sets forth a very thorough discussion on actual fraud (traditional fraud), innocent misrepresentation (constructive fraud) and silent fraud. Under Michigan law the misrepresentations made by Defendant R. Soltow and Attorney D. Austin constitute

both innocent misrepresentation and actual fraud. The withholding of information, including but not limited to, the usurious interest rates charged on the six loans discussed previously and consolidated into the note of Agusut 25, 1988, and the failure to disclose Defendants' position on the title passing to Defendant once the deed was removed from escrow, without the need of foreclosure, were nondisclosures that constitute silent fraud.

Page 114 of the Black case, supra, sets forth the general rule for actual or traditional fraud, quoting from Candler v Heigho, 208 Mich 115, 121; 175 NW 141 (1919) as follows:

> "'The general rule is that to constitute actionable fraud it must appear: (1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knwledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon (52)

by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. Each of these facts must be proved with a reasonable degree of certainty, and all of them must be found to exist; the absence of any one of them is fatal to a recovery.'"

Then on Page 116 of Black case, supra, the Court said as follows:

"The rule of 'innocent misrepresentation' is well expressed in a passage from Phillips, supra, p 20, quoting 23 Am Jur, Fraud and Deceit, Sec 120, p. 908, reincorporated in 37 Am Jur 2d, Fraud and Deceit, Sec 195, p. 257:

'The minority rule is followed in at least one state in a slightly more specific formulation; it is held that where an action is brought to recover for false and fraudulent misrepresentations made by one party to another [1] in a transaction between them, [2] any representations which are false in fact [3] and actually deceive the other, and [4] are relied on by him to his damage, are actionable, irrespective of whether the person making them acted in good faith in making them, [5] where the loss of the party deceived inures to the benefit of the other.'"

Then on Page 117 of the Black case, supra, the Court said as follows:

"In comparing the traditional common-law rule as stated in the Court of

Appeals opinion with the innocent misrepresentation rule set forth in American Jurisprudence, several significant differences appear.

1. The innocent misrepresenation rule occurs [1] in a transaction between the contracting parties, whereas no such requirement appears in the traditional rule. The instant case of course involves a contract of indemnity.

2. The requirement of scienter, i.e., knowledge of the falsity of the misrepresentation, is present in the traditional rule (3) but not present(53) in the innocent misrepresentation rule [3] and [4]. The Court of Appeals correctly recognized this.

3. The traditional misrepresentation rule requires (4) that the misrepresentation be made with the intention that it should be acted upon by the victim. The innocent misrepresentation rule has no such requirement. The quotation from American Jurisprudence states [4] 'irrespective of whether the person making them acted in good faith in making them'. As to this point, of course, the Court of Appeals applied the traditional instead of the 'innocent' misrepresentation rule. We shall discuss this further almost immediately.

4. Under the traditional misrepresentation rule, it is sufficient that the victim (6) suffer an injury. Under the innocent misrepresentation rule, the victim [5] must not only suffer an injury but also the injury must inure to the benefit of the

other."

In dicussing silent fraud, Black, supra, on Page 125 stated as follows:

> "It is generally recognized that '[f]raud may be consummated by suppression of facts and of the truth, as well as by open false assertions', Fred Macey Co v Macey, 143 Mich 138, 153; 106 NW 722 (1906), since 'a suppression of the truth may amount to a suggestion of falsehood'. Stewart v Wyoming Cattle Ranche Co, 128 US 383, 388; 9 S Ct 101; 32 L Ed 439 (1888). In order for the suppression of information to constitute silent fraud there must be a legal or equitable duty of disclosure. See 37 Am Jur 2d, Fraud and Deceit, Sec 146."

In Wolfe v A. E. Kusterer & Co (1934) 269 Mich 424, 427; 257 NW 729, the Court made the following comments concerning silent fraud:

> "'Fraud may be consummated by suppression of facts and of the truth, as well as by open false assertions.' Fred Macey Co. v Macey, 143 Mich 138, 153 (5 L.R.A. [N.S.] 1036). (54) 'In an action of deceit, it is true that silence as to a material fact is not necessarily, as a matter of law, equivalent to a false representation. But mere silence is quite different from concealment; aliud est tacere,

> aliud celare; a suppression of the truth may amount to a suggestion of falsehood; and if, with intent to deceive, either party to a contract of sale conceals or suppresses a material fact, when he is in good faith bound to disclose, this is evidence of and equivalent to a false representation, because the concealment or suppression is in effect a representation that what is disclosed is the whole truth. The gist of the action is fraudulently producing a false impression upon the mind of the other party.' Stewart v. Wyoming Cattle Ranche Co., 128 U.S. 383, 388 (9 Sup. Ct. 101)."

Under the Michigan cases, when discussing actual fraud, innocent misrepresentation or silent fraud, the Court shall grant whatever relief is appropriate under the circumstances, including equitable reliefs such as reformation, restitution or partial enforcement of the contract, and the Court can award damages. The equitable relief can include damages, they are not alternative reliefs. In Essenburg v Russell (1956) 346 Mich 319, 323; 78 NW2d 136, the Court said as follows:

"In Holcomb v Noble, 69 Mich 396, it was held that:

'The doctrine is settled in this State that if there was in fact a misrepresentation, though made innocently, and its deceptive influence was effective, the consequences to the plaintiff being as serious as though it had proceeded from a vicious purpose, he would have a right of action for the damages caused thereby either at law or in equity.'" (Citation of cases omitted)

In determining the existence of reliance under actual fraud the misrepresentation need only exert a material influ-

(55) ence. In the Black case, supra, at Page 121, the Court said as follows:

"It is well settled in Michigan that the test for determining the existence of reliance is not whether the misrepresentation was the sole influence upon the complaining party in deciding to sign the agreement but rather is 'whether the * * * misrepresentation exerted a material influence upon the minds of [the complainants], although it might be only 1 of several motives, acting together, which produced the result'. Callihan v Talkowski, 372 Mich 1, 6; 124 NW2d 788 (1963) (emphasis added)."

In the Black case, supra, at Page 134 the Court said as follows:

> "The defenses of innocent misrepresentation and silent fraud are not based in law but in equity. The equitable court awarding a remedy must look to the most just result. Therefore, should the court on remand find there was innocent misrepresentation or silent fraud it must decide which remedy would be the most equitable under the unique circumstances of the case. The court is not confined to the polar opposite remedies urged by the opposing parties: full enforcement or total abrogation of the indemnity agreement. Other remedies, such as reformation, restitution, or partial enforcement of the contract, may be examined. We leave the resolution of the proper remedy, if any, to the court below."

Plaintiffs have set forth facts which clearly demonstrate that each element of actual fraud, each element of innocent misrepresentation and each element of silent fraud have been proven. Plaintiffs have proven by documents and deeds that Plaintiffs are entitled to summary judgment as to innocent misrepresentation and silent fraud. (56)

CONCLUSION

Defendant R. Soltow and Attorney

Austin have committed actual fraud, innocent misrepresentation and silent fraud on Plaintiffs. As further demonstration of Defendant R. Soltow's greed and overreaching, Plaintiffs would refer the Court to Plaintiffs' Exhibit 26 and 27. Exhibit 27 was the letter from Defendant Soltow to Mr. Scott at Manufacturers Bank regarding a transaction by Plaintiff R. Fishell. Defendant R. Soltow was looking to have his note and mortgage paid off by a deal Plaintiff R. Fishell was engaged in through the bank. In this letter, Defendant R. Soltow advised the bank that the pay off on his mortgage from Fishells was $652,341.14 as of February 7, 1989, plus per diem interest thereafter at the rate of $250.8682. This figure was the $610,446.14 on the note of August 25, 1988 (including all the usurious interest from the six consolidated loans) together with interest at 15% per annum since August 25,

1988. Assuming for purpose of argument that the $610,446.14 was correct, then the balance owing as of February 7, 1989 and the per diem rate were accurately stated. Then Exihibit 26 (the proposed "Amendment to Note and Escrow Holding Agreement, which Defendant Soltow delivered to Plaintiffs' home on April 20, 1989) provides that if Defendant Soltow obtains title to the property through the warranty deed that was in scrow, Soltow agreed to convey back to Plaintiffs at any time from March 16, 1989 to and through April 24, 1989 "in exchange for payment by Fishells of the sum of $700,000.00 plus $300 per day from March 16, 1989 to and through the date of reconveyance." (57)

This means that the mortgage pay off went from $652,341.14 from February 7, 1989 to March 16, 1989. This is an increase of $47,658.86 in 37 days. That is $1288.08 per day, which translates into an

interest on a annual basis (365 x 1288.08) of $470,148.17. $470,148.17 for one year's interest on $610,446.14 is an interest rate of 77.02% ($470,148.17 divided by $610,446.14). In addition the $300 per diem that was going to be charged after March 16, 1989 is $109,500 per year, which is an effective interest rate from March 16, 1989 of 17.94% per annum.

This means that "this highly respected businessman," Defendant R. Soltow, and Attorney Austin were not content in charging Defendant Soltow's neighbor and friend, Plaintiff R. Fishell $160,000 in usurious interest on Agusut 25, 1988 ($610,446.14 - $450,250, being the principal indebtedness by Plaintiffs to Defendant R. Soltow on all six loans). On April 20, 1989, they attempt to gouge him another $47,658.86 in 37 days (77.02% interest) and then continue to gouge at 17.94% interest after March 14, 1989 (when the

interest rate on the note was 15%).

As indicated, Defendant R. Soltow's and Attorney Austin's misrepresentations and subsequent conduct have damaged Plaintiffs in numerous respects, which include the following:

(1) Plaintiffs have improperly had five unsecured loans grouped in with the $350,000 loan;

(2) Plaintiffs have been charged usurious interest rates on all six loans; (58)

(3) Plaintiffs could have done something with this property in the spring of 1989, particularly without being charged the usurious interest rates;

(4) Plaintiffs have been without the oportunity (sic) to sell or develop the subject property, without hinderance from Defendant R. Soltow from at least as early as February 7, 1989;

(5) The inability to develop or sell

the subject property has so destroyed Plaintiffs' economic condition that, among other things:

(a) Plaintiffs had the Andre property, which is adjacent to this property and necessary to this property for a drainage easement, foreclosed at a price approximately $100,000 in excess of what Plaintiffs would have had to pay under a settlement of the mortgage on the Andre property;

(b) Plaintiffs watched Defendant R. Soltow purchase the Andre property, except for two residential lots, at the foreclosure sale for approximately $225,000 leaving the Plaintiffs with a deficiency of approximately $80,000. Further, the attorney for Andre has threatened in Court that he was going to try to get Plaintiffs out of the protection of the bankruptcy court and attach their home in Clinton County for satisfaction of said deficiency;

(c) Plaintiffs were forced to file for relief under Chapter 11 of the Bankrupcy Act, which was devastating;

(d) Plaintiffs' credit, reputation, business opportunity and credibility together with their standing in the community have been destroyed;

(e) Plaintiffs' income situation has been destroyed to the extent that Plaintiff R. Fishell's only life insurance policy ($300,000) lapsed;

(f) Plaintiffs will have real estate sold for taxes this month; (59)

RELIEF

Plaintiffs respectfully request the same relief that was requested under the usury issue together with damages against Defendant R. Soltow. Plaintiffs are entitled to a summary judgment at least on innocent misrepresentation and silent fraud. Under silent fraud both Attorney Austin and Defendant R. Soltow admit that they did not inform Plaintiffs of the usurious interest being charged on the six loans, which was carried over and consolidated into the amended note of August 25, 1988.

Plaintiffs are therefore entitled to a summary judgment on this issue with the relief the same as prayed for under the usury issue, together with damages for the fraud. Plaintiffs would be entitled to offer proofs on the amount of damages they are entitled to after entry of summary judgment on silent fraud. (60)

THE WARRANTY DEED PLACED IN ESCROW ON AUGUST 25, 1988 IS CONSTRUED AS A MORTGAGE

In addition to the facts previously set forth in this Brief, they are several other facts that require the warranty deed to be construed to be a mortgage:

1. There was no new consideration.

   (a) The amended note consolidated six usurious loans and advanced no new dollars;

   (b) Defendant R. Soltow may claim forebearance as consideration to Plaintiffs. There was no forebearance. Under the documents of August 25, 1988, Plaintiffs had until February 15, 1989 to pay off not only the $350,000 but now $610,446.14. If Defendant R. Soltow had started foreclosure in August 1988, Plaintiffs would have had until at least September 15,

1989, some seven months more than granted to them under the documents of August 25, 1988 (even assuming for purpose of argument that Attorney Austin was correct and there was only a six month redemption period, Plaintiffs would have had four weeks until sale, i.e. until September 15, 1988 and then six months to redeem, being March 15, 1989); of course, we must assume if foreclosure would have been commenced it would have taken substantially longer because Plaintiffs would have been forced to see an attorney other than Austin and the foreclosure by advertising (61) would have been enjoined, if for no other reason, than because of the usurious interest being charged by Defendant R. Soltow;

(c) Defendant R. Soltow may claim that the consideration was Defendant giving up his right to a deficiency against Plaintiffs on the $350,000 loan and mortgage of July 8, 1986. This is no consideration. The property was worth at least $1,380,000 (according to Soltow's notes $1,500,000) and so no real risk of deficiency;

(d) Defendant R. Soltow may claim that the consideration Plaintiffs received was the consolidation of their loans with Defendant Soltow. Plaintiffs did not seek this and it was not to their benefit but to the benefit of Defendant Soltow. Defendant included five usurious, unsecured notes with the $350,000 usurious note and they were all now collateralized by the amended mortgage on the subject property.

2. The documents of August 25, 1988 in no way set out a clear expression of the release of the right of redemption (statutory or common law). The two conclusions from this very important omission is: (1) either the parties intended the transaction of August 25, 1988 to be a security agreement only; or, (2) Austin and Defendant Soltow knew Plaintiffs would never sign the documents if this were expressed. (62)

3. Plaintiffs' Exhibit 21, Declaration of Storm Drain Easement, provides that Plaintiffs' duty to maintain the property will cease if Defendant R. Soltow "takes title to Parcel one through foreclosure or through deed in lieu of foreclosure." Including the language through foreclosure supports Plaintiffs' position that the transaction of August 25, 1988, was for security only; further, any ambiguity would be resolved against Defendants,

since drafted by them.

4. Prior to the commencement of this suit, one would believe that Defendant R. Soltow intended to have only security for the repayment of his loans; except for: (1) Defendant Soltow's actions when he delivered Plaintiffs' Exhibit 26 to Fishells on April 20, 1989, (2) the contents of that document and (3) the meeting Plaintiff R. Fishell had with Attorneys Austin and Lowe on April 15, 1989.

5. In Defendant R. Soltow's deposition of 3/20/91, Pp. 86-88, he testified that on August 23, 1988 his desire was to be paid what was owed. However, after the documents were signed on August 25, 1988 his desire changed because "the signed documents presented, to me, legal remedies to the default that existed."

The law in Michigan is well settled. Any attempt or agreement purporting to destroy or impair the mortgagor's right of

redemption is invalid. In an early Michigan case that is often cited and quoted, the Court set forth the basic rule in Michigan, Batty v Snook (1858) 5 Mich 231, 239:

> "Once a mortgage always a mortgage, may be regarded as a maxim of the court. Equity is jealous of all contracts between mortgagor and mortgaee, by which the equity of redemption is to be shortened or cut off. (63) The mortgagor may release the equity of redemption to the mortgagee for a good and valuable consideration, when done voluntarily, and there is no fraud, and no undue influence brought to bear upon him for that purpose by the creditor. But it can not be done by contemporaneous or subsequent executory contract, by which the equity of redemption is to be forfeited if the mortgage debt is not paid on the day stated in such contract, without an abandonment by the court of those equitable principles it has ever acted on in relieving against penalties and forfeitures."

This principal is expanded upon in Emerson v Atwater, (1859) 7 Mich 12, on Page 24, wherein the Court held:

> "Courts of equity frequently set aside deeds and other contracts

between trustee and cestui que trust, attorney and client, guardian and ward, and parent and child, and other like cases, when it has reason for believing the relation between the parties has been abused, when such deed or contract, had it been between parties not so related, would have been held good. The principle the court goes on in cases of debtor and creditor, is the same as in the cases we have just mentioned. The difference is in its application only. In these last cases it is to prevent the abuse of a confidence which the relation implies. In the case of debtor and creditor, the abuse of the power of coercion which a creditor sometimes, by the force of circumstances, has over the debtor. So sensible are court's of the existence of this power, and of its abuse, and that debtor and creditor do not at all times stand on an equal footing, that the borrower, says Judge Story, 'has been significantly called the slave of the lender:' 1 Story's Eq. Juris., s302. And Judge Green, in Fuller v Parish, says: 'Mortgages, and conveyances intended to operate as mortgages, are generally given by the necessitous to the more opulent, the debtor to the creditor, the borrower to the lender, the suppliant for power (64) to him who has power to make the terms upon which it shall be granted. The man whose property is about to be sacrificed by a creditor, will not

hesitate in regard to the amount of security to be given, nor the manner of giving it, if he can loan the money to satisfy the debt, or otherwise gain time for its payment. He will not hesitate to execute a deed, or bill of sale, absolute upon the face of it, but intended to operate as a mortgage, to four times the value of the loan, without insisting upon a written deed of defeasance:' 3 Mich., 217."

The next maxim in Michigan law has set forth by Justice Cooley in Ferris v Wilcox (1883) 51 Mich 105; 16 N.W. 252. On Page 108 of that case, Justice Cooley set forth the basic facts as follows:

"Looking, then, at the position of the parties when these papers were executed, we find the defendant debtor and mortgagor to the plaintiffs for a certain sum of money. He deeds them the land, and they surrender to him the evidences of his indebtedness. But they immediately give him a writing promising to reconvey to him the same land provided he shall pay to them a sum of money which corresponds exactly to the sum before owing. Meantime, until default in payment, they leave him in possession an enjoyment of the land as before."

Then later on Page 108, the Justice Cooley says:

> "If, upon the face of the papers examined in the light of surrounding facts, there were any doubt of the intent, the law, taking notice of the advantage of the creditor must always have over his debtor whose property he holds in mortgage, would give the debtor the benefit of the doubt, and hold his equity of redemption to be still existing." (Cited cases omitted; emphasis supplied)
>
> "But there is no such doubt in this case. It is entirely clear that the plaintiffs have simply given up certain papers which (65) secured debts, and have taken a new paper for the payment of the same amount, and in the last paper, as much as in the first, they are creditors of defendant, holding securities from him and his absolute pomise to pay what is owing them."

Koenig v Van Reken (1979) 89 Mich App 102, 105; 279 NW2d 590, the Court said as follows:

> "At no time during the negotiations that led to the execution of these documents was plaintiff represented by an attorney, and all three documents were prepared by Stanley Van Reken."

The Court thought that this was significant even though there is nothing in the case to indicate that Defendant Stan

ley Van Reken was an attorney. In the case at bar, Attorney Austin claims that he prepared these documents for his client, Defendant R. Soltow. So if it was significant that Koenig was not represented by an attorney when the other party to the transaction did not have an attorney, it is doubly significant in this case.

The Court went on to quote earlier Michigan cases on the nature and purpose of equitable relief in cases of this nature in Michigan. Further, on Page 106 the Court said as follows:

> "The court of equity protects the necessitous by looking through form to the substance of the tansaction. Although no set criterion has been established, the controlling factor in determining whether a deed absolute on its face should be deemed a mortgage is the intention of the parties. Sheets v Huben, 354 Mich 536; 93 NW2d 168 (1958), Miskinis v Bement, 301 Mich 365; 3 NW2d 307 (1942). Such intention may be gathered from the circumstances attending the transaction includ- (66)

> ing the conduct and relative economic positions of the parties and the value of the property in relation to the price fixed in the alleged sale. 59 CJS, Mortgages, ss35, 36, pp 69-3-73. Under Michigan law, it is well settled that the adverse financial condition of the grantor, coupled with the inadequacy of the purchase price for the property, is sufficient to establish a deed absolute on its face to be a mortgage. Ellis v Wayne Real Estate Co, 357 Mich 115; 97 NW2d 758 (1959), McLaughlen v Majestic Development Corp, 247 Mich 498; 226 NW 256 (1929)." (Emphasis supplied)

In the case at bar, Plaintiffs were indebted to Defendants in the principal amount of $350,000 on note #3, which was secured by a mortgage on the subject property. To give a "deed" in escrow to pay off a $350,000 note with property that was worth at least $1,380,000 certainly lead to the conclusion that the inadequacy of the purchase price for the property is sufficient to establish this deed absolute on its face to be a mortgage.

The Michigan case of Russo v Wolburs (1982) 116 Mich App 327; 323 NW2d 385 has directly dealt with the distinction between equity of redemption (prejudicial sale often referred to as clogging the equity, as opposed to the right of redemption, which is a statutory remedy after the sale) and recognizes that Michigan adheres to the doctrine against clogging the equity of redemption. The Court cites the Batty case, supra, when reaching this conclusion.

On Page 337 of the Russo case, supra, the Court observes that Michigan Courts have consistently given careful scrutiny to any transaction in which the mortgagor waives any (67) alleged equitable or statutory right of redemption citing Nusbaum v Shapero, 249 Mich 252; 228 NW 785 (1930), Hazeltine v Granger, 44 Mich 503; 7 NW 74 (1880).

Also on Page 338, the Court said as

follows:

> "As indicated, any contract by which the mortgagor sells or conveys his interest to the mortgagee is viewed suspiciously and is carefully scrutinized by an equity court. The exchange must be fair, frank, honest, and without fraud, misconduct, undue influence, oppression or unconscionable advantage of the poverty, distress or fears of the mortgagor. Barr, supra. In other jurisdictions, courts have taken positions similar to Michigan's with regard to clogging. A mortgagor's right of redemption can be defeated only by a subsequent agreement upon new consideration. A mortgagee may not contract with the mortgagor at the time of the loan for waiver of redemption rights." (Emphasis supplied)

In the case at bar there was no new consideration. The documents of August 25, 1988 in no way set out a clear expression of the release of the right of redemption (statutory or common law). Plaintiffs' Exhibit 21, Declaration of Storm Drain Easement, recognized that Soltow might take title to this property through foreclosure. The debt of $350,000 on the property was minimal compared to the value of at least $1,380,000. The only attorney

present at the signing of these documents and the only attorney that reviewed these documents was attorney Austin. On March 24, 1988, Defendant Soltow had graciously loaned Plaintiff Richard Fishell $55,000. Then on April 29, had attorney Austin accelerate all loans and make a demand and (68) threaten foreclosure. Defendant Soltow knew that the property was just to the point where Plaintiff could benefit from the development or sale of the property. Defendant Soltow attempted to buy the property from Plaintiff and was refused. Then Defendant Soltow, through Attorney Austin, recommended these documents as a way to keep any foreclosure from being advertised and to "gain more time for Plaintiffs: than what Plaintiffs would obtain if foreclosure was commenced. All of these matters are uncontested. These certainly create a situation where a court of equity must determine that the

documents signed on August 25, 1988, were for security purposes. Just under this issue, Plaintiffs are entitled to have a court of equity draft the necessary relief to provide a fair and just treatment to the Plaintiffs. See United States Fidelity & Guaranty Co v Black, supra, wherein at p. 134, the Court stated:

> "The equitable court awarding a remedy must look to the most just result."

RELIEF

Fair and just treatment to the Plaintiffs under this issue would best be srved by the Court awarding Plaintiffs the same relief they requested under the usury issue, together with damages for the Plaintiffs being deprived of the right to sell and/or develop the subject property since February 7, 1980. Plaintiffs should receive a summary judgment, under this issue, in the same form as prayed for under the usury issue. Then Plaintiffs

should be given the opportunity to offer proofs on damages against said Defendant Robert Soltow. (69)

THE PAROL EVIDENCE RULE IS NOT APPLICABLE IN THIS CASE.

None of the cases cited by Defendants under Argument 3 of their Brief, dealing with the parol evidence rule, are applicable in this case. Defendants failed to make a fair and accurate presentation of the law concerning the parol evidence in a case of this nature. In NAG Enterprises v All State (1979) 407 Mich 407, 410; 285 NW2d 770, the Court said as follows:

> "The Court went on to discuss Goodwin, Inc. v Orson E. Coe Pontiac, Inc. 392 Mich 195; 220 NW2d 664 (1974), and Union Oil Co of California v Newton, 397 Mich 486; 245 NW2d 11 (1976), and concluded that the test for applying the parol evidence seeks to contradict the terms of the written instrument.
>
> This analysis overlooks the prerequisite to the application of the parol evidence rule: there must be a finding that the parties intended the written instrument to

> be a complete expression of their agreement as to the matters covered. Extrinsic evidence of prior or contemporaneous agreements or negotiations is admissible as it bears on this threshold question of whether the written instrument is such an 'integrated' agreement."

There is no language in any document signed on August 25, 1988, saying that any document is an integrated agreement. The NAG case would be controlling and the parol evidence would be permitted.

However, all that analysis is not necessary. There is no parol evidence being offered under the usury issue; that's (70) all written documents prepared by either the Defendant or his attorney.

Parol evidence is always admissible in a claim of fraud, therefore, parol evidence would be allowed under the fraud issue of this brief. Rood v Midwest Matrix Mart, Inc, 350 Mich 559, 564-567; 87 NW2d 186 (1957); Schupp v Davey Tree Expert Co, 235 Mich 268, 271, 209 NW 85 (1926). This exception was recognized on

Page 410 of the NAG Enterprises case, supra. See U. S. Fidelity & Guaranty v Black, supra.

In addition, the parol evidence rule does not prohibit oral proof that the deed executed on August 25, 1988, was given to secure a loan. Selik v Goldman Realty Co (1927) 240 Mich 612, 614, 216 NW 422, wherein the Court said as follows:

> "The law is well settled that oral proof is permissible to show that a deed was given to secure a loan and therefore in legal effect operated only as a mortgage."

(argument re summary judgment, deleted, p. 71-75)

(76) SUMMARY

Under the usury issue, Plaintiffs have shown that the Defendant and Attorney Austin charged Plaintiffs usurious interest rates on all six loans and that that usury was carried over into the amended promissory note dated August 25, 1988. Under the fraud issue, Plaintiffs have

shown that Defendant Robert Soltow by himself and through Attorney Austin is guilty of actual fraud, innocent misrepresentaton and silent fraud. There is no question that Plaintiffs have shown silent fraud sufficiently to require summary judgment on behalf of Plaintiffs. Plaintiffs have also shown innocent misrepresentation by documents and testimony that is not controverted by Defendants. In fact, Defendant Soltow's testimony supports Plaintiffs' position in this respect when he indicates that August 23, 1988 all he wanted was his money back but then that changed after the documents were signed on August 25, 1988, because he saw what legal remedies he now had. Plaintiffs believe they have also shown acutal fraud with the uncontested facts that they have set forth. However, it is only necessary that the Court find either actual fraud, innocent misrepresentations or silent fraud in

order to enter a summary judgment for Plaintiffs on the fraud issue. The only thing that would be left to take proofs on regarding the fraud issue would be the amount of damages sustained by Plaintiffs.

Plaintiffs have also shown that the so-called deed placed in escrow on August 25, 1988, was really a document for (77) security purposes. These facts have also been shown by documentation and by uncontroverted evidence and Plaintiffs are entitled to a summary judgment as to this issue. The only matter left for proofs for the Court on this issue would be concerning the damages Plaintiffs are entitled to for Defendant Robert Soltow's conduct.

Plaintiffs would refer this Court to Cullins v Magic Mortgage, Inc, (1970) 23 Mich App 251; 178 NW2d 532 the Cullins case, supra, sets forth a very appropriate analysis for the case at bar. The

Cullins case discusses the combination of usury and equitable mortgage. Commencing on Page 256 the Court said as follows:

> "The plaintiffs contend that since the defendants knew of plaintiffs' plight, an equitable mortgage was imposed upon them regardless of the form of the transaction. We agree.
>
> The trial court erred as to the law. He has, and we are, bound by the decision of our Supreme Court in Wilcox v Moore (1958), 354 Mich 499. Although the transaction between the plaintiffs and defendants did not take the form of a loan, neither did the transaction before the Court in Wilcox, supra. Yet, an an equitable mortgage was established with resultant application of the law of usury." (Emphasis supplied)

In the case at bar, the Defendant well knew Plaintiff's' plight when the transaction of August 25, 1988 took place. Not only do Plaintiffs have an equtiable mortgage with an application of the law of usury, Plaintiffs have fraud, equitable mortgage and the application of the law of usury. (78)

The Cullins Court, supra, has other

language that this Court should keep in mind while reviewing this case. On Page 257 of the Cullins case, the Court went on to say:

> "The Court in Wilcox, supra, said on pp 504, 505:
>
> 'There is no need, at this late date in the law of ususry (sic) (see Leviticus 25: 35-37; Deuteronomy 23: 19, 20; Saint Chrysostom's Fifth Homily on the Gospel of St. Matthew; CL 1948, Sec 438.52 [Stat Ann Sec 19.121]) to discuss its rationale. Suffice to say that its purpose is to protect the necessitous borrower from extortion. In the accomplishment of this purpose a court must look squarely at the real nature of the transaction, thus avoiding, so far as lies within its power, the betrayal of justice by the cloak of words, the contrivances of form, or the paper tigers of the crafty. We are interested not in form or color but in nature and substance."
> (Emphasis added)

The above quote is applicable on every aspect of this case. We have usury on six loans which Defendant Robert Soltow attempted to camouflage into a new amended note on August 25, 1988. In trying to hide, bury or cover up the prior usury,

Defendant Robert Soltow and Attorney Austin put a 15% interest rate on the amended note of August 25, 1988, not the 15% interest shifting to 20% interest, as was done on the July 8, 1986 note. Then Defendant Soltow and Attorney Austin prepared all these papers on August 25, 1988 which in effect do nothing to benefit Plaintiffs and attempt to create an unconscionably improved position for Defendant Soltow. With a subsequent agreement such as August 25, 1988, the cases require under usury, and equitable mortgage, that the Court must "look squarely at the real nature of the transaction" and avoid "paper tigers of the crafty." (79)

RELIEF

A summary judgment for Plaintiffs on the usury issue and the fraud issue would entitle Plaintiffs to all the relief requested herein. Summary Judgment for Plaintiffs on the usury issue and the

equitable mortgage issue would entitle Plaintiffs to all the relief requested herein. Summary Judgment on behalf of Plaintiffs on all three issues, usury, fraud and equitable mortgage, would entitle Plaintiffs to all the relief requested herein. Summary Judgment on just the usury issue would entitle Plaintiffs to all the relief requested herein except damages for fraud or damages under the Court's equitable authority in the equitable mortgage issue. Plaintiffs respectfully request the Court to issue a Summary Judgment on their behalf on three issues and to provide Plaintiffs with the following relief:

1. Cancel all the documents of August 25, 1988;

2. Determine that Defendant Robert Soltow has a mortgage on the subject property for the principal amount of loan #3, dated July 8, 1986, for $350,000 and that

no interest can accumulate on the $350,000 because of the prior usury;

3. That Plaintiff Richard Fishell individually in indebted to Defendant Robert Soltow as follows:

(a) $4,000 on loan #1, dated April 23, 1982. Said indebtedness is unsecured and no interest can accumulate on same; (80)

(b) $6,250 on loan #2, dated January 26, 1986. Said indebtedness is unsecured and no interest can accumulate on same;

(c) $55,000 on loan #6, dated March 24, 1988. Said indebtedness is unsecured and no interest can accumulate on same;

4. That Plaintiffs Richard and Dorothy Fishell are indebted to Defendant Robert Soltow as follows:

(a) $10,000 on loan #4, dated July 16, 1987. Said indebtedness is unse-

cured and no interest can accumulate on same;

(b) Plaintiffs Richard and Dorothy Fishell are indebted to Defendant Robert Soltow in the amount of $25,000 on loan #5, dated September 23, 1987. Said indebtedness is unsecured and no interest can accumulate on same;

5. That Defendants are barred from the recovery of any interest, any official fees, delinquency or collection charge, attorney's fees or court costs;

6. That Plaintiffs shall recover their attorney's fees and court costs from Defendants incurred in this litigation since its commencement in Eaton County Circuit Court on April 27, 1989;

7. Under the fraud and equitable mortgage issues, Plaintiffs would request all the above relief together with damages, including but not limited to those damages set forth in (81) the conclusion

section of the fraud issue, commencing on Page 57 and including paragraphs (1) through (5)(a) through (f). That Plaintiffs would offer proofs subsequent to the entry of summary judgment as to the amount of those damages;

8. The above relief would require the judgment or order of this Court cancelling the documents of August 25, 1988, to set aside the recorded deed, set aside the Affidavit of Douglas Austin dated February 7, 1989 and filed on the same day, and setting aside the recording of the mortgage modification agreement dated August 25, 1988;

9. Order Defendants to convey to Plaintiffs the Andre property that Defendant R. Soltow purchased at the foreclosure sale under the terms and conditions the Court determines to be equitable, taking into consideration Plaintiffs' claims for damages against Defendants. The Andre

property is necessary to the use of the subject property because the drainage for the subject property is across the Andre property. That was the reason for the Declaration of Storm Drain Easement on August 25, 1988 (Plaintiffs' Exhibit 21).

10. Plaintiffs respectfully request the Court to grant any additional relief that the Court feels equity and justice require.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

RICHARD L. FISHELL
and
DOROTHY M. FISHELL

Petitioners

vs.

ROBERT SOLTOW
and
ROSALEE SOLTOW
and
JOHN A. PORTER, Trustee

Respondents

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

RESPONDENT JOHN A. PORTER'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT'S AFFIRMATION OF THE DISTRICT COURT'S FINDING THAT PETITIONERS DID NOT HAVE STANDING TO APPEAL CREATES A CONFLICT WITH DECISIONS OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST AND SEVENTH CIRCUITS.
2. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT'S AFFIRMATION OF THE BANKRUPTCY COURT'S APPROVAL OF THE COMPROMISE BETWEEN THE TRUSTEE IN BANKRUPTCY AND THE ESTATE'S LARGEST CREDITOR CREATES A CONFLICT WITH THE DECISION OF THE UNITED STATES SUPREME COURT IN TMT TRAILER FERRY, INC. V. ANDERSON, 390 U.S. 414 (1968) OR WITH THE DECISION OF ANY COURT OF APPEALS ON THIS ISSUE.
3. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDING AS TO WARRANT REVIEW BY THE UNITED STATES SUPREME COURT WHEN IT HELD THE BANKRUPTCY COURT ACTED WITHIN ITS DISCRETION WHEN IT APPROVED THE COMPROMISE OF THE ADVERSARY PROCEEDING BETWEEN THE TRUSTEE IN BANKRUPTCY AND THE ESTATE'S LARGEST CREDITOR.

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STATEMENT OF THE CASE

The Trustee in bankruptcy generally concurs with the Statement of the Case as set forth by the Petitioners. However, Petitioners' characterizations of the opinions below and the facts contain significant omissions and inaccuracies. This brief addresses those misstatements of fact.

The Bankruptcy Court approved the compromise of the adversary proceeding between Mr. Porter, the Trustee in bankruptcy, and the Soltows, the estate's largest creditor for the following reasons: Mr. Porter concluded the settlement was in the estate's best interest after he retained independent counsel to investigate the proposed settlement at great length (A.71); the Court agreed the settlement was reasonable (A.71); no creditors objected to the settlement (A.72); the "tremendous number of delays" caused by the Petitioners continuously drained funds from the estate which were destined for distribution to creditors (A.72); and lastly, because of the financial hardships imposed upon the Soltows by the Petitioners' delays (A.73). The Bankruptcy Court approved the compromise for all of the above reasons, not simply because it was a requirement of the settlement agreement (Petr. Br. 6).

Petitioners urge this Court to accept the assertion that the value of the 43 acres of land upon which Petitioners filed a lis pendens equals

$1.3-$1.5 million dollars. This statement omits that prior to instituting the compromised litigation, Petitioners attempted to sell this property at a price exceeding the mortgage of $610,446.14. For a period exceeding two and a half years, this effort was unsuccessful. (A.23; A.189-193). Petitioner's value assessment is clearly suspect considering the true fair market value of property is the price at which a willing buyer agrees to purchase it from a willing seller, and Petitioners found no willing buyer.

Petitioners claim the promissory notes underlying the mortgage were "usury infected" (Petr. Br. 8-9). Further, they claim Michigan law authorized the filing of the lis pendens on Mr. Soltow's property with the result that the Soltow's claim was meritless (Petr. Br. 9). Both statements fail to mention the merits of these positions were extensively and independently researched by Mr. Porter's counsel (A.148). Rather than finding support for the Petitioners' claims, Mr. Porter's counsel concluded that when weighed against the costs of litigation, the usury claim would not result in a favorable monetary outcome to the estate. The research also revealed the Soltow's counterclaim contained sufficient merit to warrant a compromise (A.16). In addition, Petitioners' statement of the case does not acknowledge Mr. Porter's formal examination of Petitioner Richard Fishell, under Fed. R. Bankr. P. 2004, for the purpose of determining the strength

of his claims and their likelihood of success nor does it acknowledge that as a result of the examination, Mr. Porter concluded Petitioner's claims lacked sufficient merit to achieve success in the adversary proceeding (A.63).

Petitioners imply the Bankruptcy Court based its approval of the compromise between Mr. Porter and the Soltows on one hour-long hearing (Petr. Br. 10). In reality, the Bankruptcy Court conducted a pre-trial of the adversary proceeding, ruled on a motion for jury trial, read and ruled on motions for summary judgment, was present for the examination of the Petitioner, considered briefs with regard to the compromise, and disposed of, in the words of the court, "every motion that almost is imaginable" (A.158-160). It is on this foundation, in addition to arguments of counsel, upon which the court rested its decision.

Petitioners insinuate the court favored Respondents in the approval hearing of July 10, 1992 (Petr. Br. 10). The record, however, reflects the Bankruptcy Court's apportionment of argument time stemmed from a desire for a fair balance between the two parties and the Petitioners rather than a predisposition against Petitioners (A.109).

Petitioners contend that Mr. Porter and the Soltows submitted no witnesses, failed to analyze the law relating to the opposing claims of the

adversary proceeding and did not submit findings of fact or conclusions of law (Petr. Br. 11). Petitioners fail to recognize the independent and extensive research conducted by Mr. Porter's counsel, the voluminous material examined by the Bankruptcy Court, Mr. Porter's examination of Petitioner Richard Fishell, the estate's key witness in the adversary proceeding, and the extensive analysis of the issues conducted by the Soltows as parties to the adversary proceeding. (A.71; A.158-160; A.63; A.116).

Petitioners note the Bankruptcy Court did not read the brief in opposition to the compromise they filed on July 10, 1992 (Petr. Br. 11-12). They fail to note the filing was not timely, and Petitioners' counsel briefed the court on its contents during oral arguments (A.144-145).

Petitioners assert Mr. Porter's arguments in Bankruptcy Court were speculative (Petr. Br. 12). However, Petitioners fail to appreciate that when compromising an adversary proceeding and weighing the advantages and disadvantages of litigation, a Trustee, such as Mr. Porter, and the court must rely upon the experience of those involved in the bankruptcy process. The weight given to the judgments of bankruptcy experts such as Mr. Porter's counsel, and experienced Trustees, such as Mr. Porter, as to the merits of litigation is justifiably significant and not mere speculation.

Finally, Petitioners state the Bankruptcy Court failed to take into account the merits of Petitioners' cause of action in the adversary proceeding and failed to elaborate on its reasons for approving the compromise (Petr. Br. 12-14). On the contrary, the Bankruptcy Court specifically referred to its familiarity with the legal issues involved in the adversary proceeding (A.160). The court mentioned it was familiar with the state court proceedings, the pre-trial conducted in Bankruptcy Court, the independent investigation of the facts and issues surrounding the case, the motions for summary judgment, the motion for a jury trial and the subsequent appeal, the oral arguments of counsel and the briefs supporting and opposing the compromise (A.67; A.70; A.71; A.145; A.159-160). That the Bankruptcy Judge referred to his familiarity with this mass of information evinces the Bankruptcy Court both understood the issues and identified which portions of the record supported approval of the compromise.

SUMMARY OF THE ARGUMENT

In its decision below, the United States Court of Appeals for the Sixth Circuit applied the First Circuit rule regarding standing to appeal in Bankruptcy Court. The rule holds that the right to appellate review is limited to those persons whose rights and interests are affected by the proceedings. Generally, debtors in Chapter 7 proceedings have no standing

because their position is now represented by the Trustee. There is however, an exception for those debtors who show the estate has assets that exceed liabilities. The Seventh Circuit utilizes the same rule. Because the First, Sixth, and Seventh Circuits all employ the same rule regarding appellate standing in Bankruptcy Court, there is no conflict that would justify granting the Petition for Writ of Certiorari.

In its decision below, the Court of Appeals for the Sixth Circuit applied the standard set forth by this Court for review of a Bankruptcy Court's approval of a compromise. That standard requires the Bankruptcy Court to make an "informed, independent" judgment that the compromise is fair and equitable. Furthermore, the Bankruptcy Court must apprise itself of all the facts necessary for an intelligent and objective opinion. The cases Petitioner cites as being in conflict with the Sixth Circuit's decision all adhere to this standard. Therefore, because the Sixth Circuit and the other Circuit decisions cited by Petitioner all adhere to the standards set forth by this Court, there is no conflict among the circuits or between this Court and the decision below. Thus, there is no conflict that would justify granting the Petition for Writ of Certiorari.

In its decision below, the Court of Appeals for the Sixth Circuit applied the appropriate standard set forth by this Court when it reviewed the Bankruptcy Court's approval of a compromise between the Trustee and

the Soltows. It applied that standard correctly as evidenced by the abundance of material it demonstrated the Bankruptcy Court considered in making its decision. As a result, the Court of Appeals did not depart from the accepted and usual course of judicial proceedings or sanction such a departure by the Courts below.

ARGUMENT

I. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DOES NOT CONFLICT WITH THE DECISIONS OF THE UNITED STATES COURT OF APPEALS IN EITHER THE FIRST OR SEVENTH CIRCUIT WHICH ADDRESS DEBTOR STANDING.[1]

In the instant case, the Court of Appeals cites the rule and exceptions regarding standing to appeal in bankruptcy litigation established in In re El San Juan Hotel, 809 F.2d 151 (1st Cir. 1987). In adjudicating whether a former trustee had standing to appeal a bankruptcy court order,

---

[1] Should this Court rule in favor of Petitioners with regard to the standing issue, there still remains the decisions of both the District Court and Court of Appeals on the underlying issue of whether the Bankruptcy Court abused its discretion in approving the compromise. Both courts found the Bankruptcy Court did not abuse its discretion in approving the proposed settlement after ruling Petitioners did not have standing to appeal. Significantly, the Bankruptcy Court did not deny Petitioners' standing to oppose the compromise and be heard when it considered the compromise. Thus, even if the District Court and Court of Appeals erred in holding the Petitioners lacked standing, it would be harmless error under the circumstances of this case.

the court recited the general rule and exceptions regarding standing to appeal in bankruptcy litigation:

> [T]he right of appellate review in bankruptcy proceedings has historically been limited to "persons aggrieved," *i.e.*, to those persons whose rights or interests are "directly and adversely affected pecuniarily" by the order or decree of the bankruptcy court . . .
>
> The evolution of the appellate standing principles, and the application of this qualifying formula, focused primarily on the bankrupt or trustee as appellant. Ordinarily under the Bankruptcy Act, . . . a bankrupt was not found to be a "person aggrieved" because adjudication absolved the bankrupt of liability and he had no interest in the distribution of property of the estate since the bankrupt's property had passed to the trustee by virtue of the Bankruptcy Act. Thus, a hopelessly insolvent debtor does not have standing to appeal orders affecting the size of the estate since such an order would not diminish the debtor's property, increase his burdens, or detrimentally affect his rights.

Id. (citing in part In re Fondiller, 707 F.2d 441, 442 (9th Cir. 1983)).

> The court noted two exceptions to this rule:
>
> 1) if a successful appeal by the debtor would create an estate that has assets in excess of liabilities, . . . and 2) an appeal taken from orders that affect the terms, conditions and extent of a debtors discharge. . . .

Id. at 155. As stated above, the Court of Appeals specifically relied upon this rule and these exceptions in its opinion when affirming the District Court's decision. The Seventh Circuit employs the same rule.

Petitioners cite In re Andreuccetti, 975 F.2d 413 (7th Cir. 1992) as evidence the Court of Appeals for the Sixth Circuit wielded a different standard when finding Petitioners lacked standing. However, the Seventh Circuit actually cited the same passage as did the Sixth Circuit:

> As we have recently noted:
>
> > In order to appeal a bankruptcy court's order, a litigant must qualify as a "person aggrieved" by the order. In re El San Juan Hotel, 809 F.2d 151, 154 (1st Cir. 1987). A "person aggrieved" by a bankruptcy order must demonstrate that the order diminishes the person's property, increases the person's burdens, or impairs the person's rights. See In re Fondiller, 707 F.2d 441, 442 (9th Cir. 1983).

Id. at 416. Thus, the fact that both the Sixth Circuit in the instant case and the Seventh Circuit in In re Andreuccetti employed the same rule found in In re El San Juan Hotel reveals there is no conflict between the Sixth, Seventh and First Circuits with regard to standing to appeal in bankruptcy litigation.[2] Rather, Petitioners object to the findings of the courts below pursuant to this standard. Both the District Court and the Court of Appeals found Petitioners presented insufficient evidence to warrant application of the exception to the general rule that they lacked standing.

In sum, there is no conflict between the decision of the United States Court of Appeals for the Sixth Circuit below and the decision of the

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[2] The other authorities Petitioners cite relate to creditors and are inapplicable.

Seventh Circuit in In re Andreuccetti or the decision of the First Circuit in In re El San Juan Hotel. Therefore, pursuant to Supreme Court Rule 10.1(a), there is no basis for which to grant the Petition for Writ of Certiorari in order to resolve conflicts regarding standing to appeal in bankruptcy litigation.

II. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DOES NOT CONFLICT WITH EITHER DECISIONS OF THE UNITED STATES SUPREME COURT OR DECISIONS OF THE OTHER CIRCUITS WITH REGARD TO THE STANDARD BANKRUPTCY COURTS MUST USE WHEN APPROVING COMPROMISES.

The United States Court of Appeals for the Sixth Circuit applied the standard established in Protective Committee for Shareholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414 (1968) when reviewing the Bankruptcy Court's approval of the compromise between Mr. Porter, the Trustee in bankruptcy, and the Soltows. In TMT Trailer Ferry, Inc., the United States Supreme Court held:

> [I]t is essential that every important determination in reorganization proceedings receive the 'informed, independent judgment' of the bankruptcy court . . . The requirements of [the Bankruptcy Act], that plans of reorganization be both 'fair and equitable,' apply to compromises just as to other aspects of reorganizations . . .

> There can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all the facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated.

Id. at 424. The Court of Appeals for the Sixth Circuit applied the standard established above to the instant case.

The Court of Appeals demonstrated it was conversant with the applicable standard when it stated:

> In analyzing a settlement, "the court is obligated to weigh all conflicting interests in deciding whether the compromise is 'fair and equitable,' considering such factors as the probability of success on the merits, the complexity and expense of litigation, and the reasonable views of creditors" . . . In essence, the bankruptcy court must make an independent judgment that a proposed settlement is fair and equitable.

(A.31, citing Bauer v. Commerce Union Bank, 859 F.2d 438, 441 (6th Cir. 1988), cert. denied 489 U.S. 1079 (1989). Thus, it is evident the Court of Appeals used the standard set forth in TMT Trailer Ferry, Inc. when it affirmed the lower court rulings in regard to the Trustee-Soltow compromise.

Petitioners allege the Sixth Circuit's decision utilizes a standard for reviewing compromise agreements different from that of other circuits.[3] A review of the circuit decisions which Petitioners cite in support of this position reveals no such conflict exists. The court in each of the following cases reiterates the standard outlined in TMT Trailer Ferry, Inc. when it details the duties of the Bankruptcy Court when considering approval of a compromise settlement: In re Walsh Construction, Inc., 669 F.2d 1325, 1328 (9th Cir. 1982); Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977); In re Corrugated Container Antitrust Litigation, 643 F.2d 195, 212 (5th Cir. 1981); Plummer v. Chemical Bank, 668 F.2d 654, 659 (2nd Cir. 1982); In re Boston and Providence Railroad, 673 F.2d 11, 12 (1st Cir. 1982); In re Jackson Brewing Company, 624 F.2d 605, 612 (5th Cir. 1980); and Matter of AWECO, Inc., 725 F.2d 293, 298 (5th Cir. 1984). Thus, because the Sixth Circuit decision in the present matter strictly complied with the standard set forth in TMT Trailer Ferry, Inc. for approval of compromises in bankruptcy proceedings and the Circuit Court decisions

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[3] The Petitioners' brief asserts a conflict among the 6th, 7th and 9th Circuits in its Questions Presented, but later claims a conflict exists with the 5th Circuit as well. As a result of this incongruity, this brief will address all the relevant cases Petitioners cite.

cited by Petitioners also utilize the same standard, there is no conflict among the circuits.

It is also relevant that Petitioners exclude from the applicable law the pertinent portion of In re A & C Properties, 784 F.2d 1377 (9th Cir. 1986), cert. denied 479 U.S. 854 (1986). There, in a situation similar to the instant case, the court found the findings of fact to be sufficient:

> In our case, the bankruptcy court's findings of fact and conclusions of law are rather general. However, the bankruptcy court attached to these findings and conclusions a copy of the settlement agreement upon which it relied, and which it approved. . . Appellate review is made more difficult by the lower court's failure to write an opinion explaining why it deemed the compromise to be fair, reasonable and adequate. . . However, where the record supports approval of the compromise, the bankruptcy court should be affirmed. . .
>
> It is clear from the record before us, which is well over four thousand pages with reporter's transcripts amounting to nearly one thousand pages, that the bankruptcy judge was informed and had apprised himself of all facts necessary to make an intelligent and independent judgment that the compromise was fair and equitable.

Id. at 1382. It is this Circuit Court decision that is the most applicable to the instant case and it is clearly not in conflict with the decisions below.

In sum, there is no conflict between the decision of the United States Court of Appeals for the Sixth Circuit and "the decision of another United States Court of Appeals on the same matter," or any decision of the

United States Supreme Court. Supreme Court Rule 10.1(a);(c). Therefore, there is no basis for which to grant the Petition for Writ of Certiorari in order to resolve conflicts involving the standards a Bankruptcy Court must follow in order to approve a compromise.

III. THE COURT OF APPEALS FOR THE SIXTH CIRCUIT CORRECTLY APPLIED THE STANDARDS SET FORTH IN TMT TRAILER FERRY, INC., WHICH DETAILED THE DUTIES OF THE BANKRUPTCY COURT WHEN CONSIDERING APPROVAL OF A COMPROMISE, TO THE BANKRUPTCY COURT'S DECISION BELOW AND DID NOT SANCTION A DEPARTURE FROM THOSE STANDARDS BY THE COURTS BELOW.

It is evident from the Sixth Circuit's opinion below that the court not only based its affirmation upon the correct standard, but that there was ample reason to do so. Again, the relevant holding in TMT Trailer Ferry, Inc. requires compliance with the following:

> [I]t is essential that every important determination in reorganization proceedings receive the 'informed, independent judgment' of the bankruptcy court . . . The requirements of [t.e Bankruptcy Act], that plans of reorganization be both 'fair and equitable,' apply to compromises just as to other aspects of reorganizations . . . There can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all the facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated.

Id. at 424. Therefore, the crux of the issue is whether the Court, in reviewing whether the Bankruptcy Court abused its discretion, properly held the Bankruptcy Court to the correct standard.

As evidenced above (pages 7-9), the Court of Appeals did review the Bankruptcy Court's approval of the compromise in light of the standards set forth in TMT Trailer Ferry, Inc. Its review concluded the Bankruptcy Court did not abuse its discretion. The Court of Appeals proceeded to list the many factors the Bankruptcy Court identified in its findings showing it approved the settlement between the Trustee, Mr. Porter, and the Soltows:

> [T]he record before [this] court clearly supports the approval of the compromise. The Bankruptcy Court had before it the record developed in the state court proceeding, as well as the extensive record developed before the bankruptcy court itself. The Bankruptcy Court held several hearings and decided several motions related to the instant proceeding. These included motions for summary judgment and a formal Rule 2004 examination of Richard Fishell. Accordingly, the Bankruptcy Court possessed a good deal of information and knowledge about the dispute between the Fishells and the Soltows and how that dispute affected the Fishells' other creditors.

(A.15). Here, the Court of Appeals provides the reasons why the Bankruptcy Court's approval of the compromise satisfies the requirement that the judge "apprise himself of the relevant facts and law so that he can

make an informed and intelligent decision, and set out the reasons for that decision" (A.13).[4]

Therefore, the Court of Appeals for the Sixth Circuit correctly applied the applicable standard for review of a Bankruptcy Court's approval of a compromise. The court also outlined the reasons why the Bankruptcy Court satisfied those requirements and thus did not "depart from the accepted and usual course of judicial proceedings" or "sanction such a departure by a lower court." Supreme Court Rule 10.1(a). For that reason, there is no basis on which to grant the Petition for Writ of Certiorari in order to exercise this Court's power of supervision.

CONCLUSION

There is no conflict between the decision of the United States Court of Appeals for the Sixth Circuit below and any of this Court's decisions or the decisions of any other United States Court of Appeals. Similarly, the court below did not depart from the accepted and usual course of judicial

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[4] Careful review of the Bankruptcy Court proceedings reveals the court's findings do in fact mention the numerous facts upon which it based its decision; the Court of Appeals is nevertheless correct in citing In re A&C Properties, 784 F.2d 1377, 1381 (9th Cir. 1986), cert. denied 479 U.S. 854 (1986), which states it is sufficient for the Bankruptcy Court's record to contain adequate facts with which to make an informed decision.

proceedings or sanction such a departure by a lower court. Mr. Porter, the Trustee in bankruptcy, asks that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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No. 95-30

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

RICHARD L. FISHELL and DOROTHY M. FISHELL,
Petitioners,

v.

ROBERT SOLTOW and ROSALEE SOLTOW,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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3 pp

QUESTIONS PRESENTED

1. Whether the District Court for the Western District of Michigan and the United States Court of Appeals for the Sixth Circuit erred when they held that the Debtors (Petitioners) did not have standing to appeal the settlement of an adversary proceeding where Debtors (Petitioners) were not parties to the Settlement Agreement and where they failed to establish that they were "persons aggrieved" by the Bankruptcy Court's Order approving the settlement.

2. Whether the Bankruptcy Court's exercise of its discretion in approving the settlement of an adversary proceeding pursuant to 11 U.S.C. §9019(a) after first familiarizing itself with the facts and the legal theories of the parties creates a conflict of authority within the Circuit Court of Appeals.

3. Whether the Bankruptcy Court's approval of the settlement of a fact specific adversary proceeding, important only to the parties involved, and so lacking in legal significance that neither the District Court nor the Court of Appeals issued published opinions is the type of case warranting review by the United States Supreme Court.

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STATUTORY PROVISIONS INVOLVED

Fed. R. Bank. P. 9019(a) provides:

> "(a) *Compromise*. On motion by the Trustee and after a hearing on notice of creditors, the United States Trustee, the Debtor and indenture Trustees as provided in Rule 2002 and to such other entities as the Court may designate, the Court may approve a compromise or settlement.

STATEMENT OF THE CASE

Respondents, Robert and Rosalee Soltow ("Soltows"), respectfully request that this Court deny the Petition for Writ of Certiorari which seeks review of the Sixth Circuit's Opinion below. That Opinion, like the District Court's Opinion, is unpublished but both are reprinted in the Addendum to the Petition for Writ of Certiorari at A-1 and A-21.

Soltows[1] generally concur with the Statement of the Case as set forth in Petitioners' brief. However, the Fact Summary included in Petitioners' brief includes a somewhat misleading chronology, pertinent omissions as well as inaccurate statements which Soltows will point out in this section.[2]

The instant Petition for Writ of Certiorari taken by Petitioners represents the latest chapter in this protracted litigation fraught with continuous delaying tactics on the part of the Petitioners. These delaying tactics, including the filing of bankruptcy itself, has had the effect of stopping the sale of the real property which was the subject of the adversary proceeding by the current owners (Soltows) for over six (6) years.

This matter arises out of the Bankruptcy Court for the Western District of Michigan's approval of the Chapter 7 Trustee's Motion to Approve Settlement of an Adversary Proceeding following a hearing held on July 10, 1992. [A102-A168.] The settlement of the adversary proceeding resulted in

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[1]Respondent Robert Soltow died in June of 1995. His wife, Respondent Rosalee Soltow, has been appointed personal representative of his estate.

[2]Throughout the remainder of this Brief, Respondents will be referred to by their names, i.e., Robert and Rosalee Soltow "Soltows" or "Respondents" and the Chapter 7 Trustee, John Porter, as "Trustee". Petitioners will be referred to as either the "Debtors", "Petitioners", or "Fishells".

the dismissal of the Estate's complaint against Robert and Rosalee Soltow which had previously been brought by Debtors Richard L. and Dorothy M. Fishell wherein Mr. Fishell alleged inter alia that he held an equitable mortgage on the property because he "didn't understand" the deed he gave to Robert Soltow in 1988 in lieu of foreclosure on a 44-acre parcel of property located in Eaton County, Michigan (the "Subject Property"). In exchange for dismissal of the lawsuit against the Soltows, the Estate received in consideration from Robert Soltow, a payment in the sum of $2,000 to the Estate and the release of Mr. Soltow's counterclaim against the Estate valued by Mr. Soltow at over $250,000, wherein he alleged slander of title as a result of the Debtors' wrongful filing of a Lis Pendens on the Subject Property. It was contended by Soltows that the wrongful filing of the Lis Pendens prevented conveyance of the Subject Property during the pendency of the litigation.

Debtors initially filed a Chapter 11 Bankruptcy Petition in the United States Bankruptcy Court for the Western District of Michigan on November 16, 1990. Their case was converted to Chapter 7 on January 13, 1992 following a hearing on the U. S. Trustee's and Creditors Soltows' and Fraser Trebilcock Davis & Foster, P.C.'s Motion to Convert. Creditor Patricia Andre also filed a joinder motion seeking conversion. Debtors subsequently sought reconsideration of the conversion but the reconsideration motion was denied on January 31, 1992. An appeal of the conversion was taken by Fishells to the U.S. District Court for the Western District of Michigan which on November 24, 1992 affirmed the Bankruptcy Court's Order of Conversion to Chapter 7. Debtors subsequently appealed the U.S. District Court's affirmance of the conversion to the United States Court of Appeals for the Sixth Circuit which

affirmed the District Court and the Bankruptcy Court on March 1, 1994 in an unpublished decision.[3]

Following conversion to Chapter 7, the Bankruptcy Court appointed Respondent John Porter as the Chapter 7 Trustee to effectuate and administer the liquidation of the Chapter 7 bankruptcy estate. As part of fulfilling that function the Trustee was required to evaluate the adversary proceeding filed by the Debtors against the Soltows and determine whether the lawsuit was an asset of value of the Estate. The adversary proceeding was originally a state court proceeding filed by the Debtors against Soltows in 1989 concerning the Subject Property but which had been removed by the Debtors to the Bankruptcy Court shortly after the filing of the Chapter 11 proceeding.

The adversary proceeding brought by the Debtors against Soltows, sought to avoid a deed in lieu of foreclosure given to Robert Soltow through which the Debtors conveyed the Subject Property. The lawsuit had been in litigation for three years prior to the Bankruptcy Court's approval of the settlement. However, much of the litigation took place while the case was pending before the Bankruptcy Court. This included cross motions for summary judgment and lengthy supporting briefs, depositions and an extensive pretrial conducted by the Bankruptcy Court.

The Underlying Transaction

The adversary proceeding arises from a 1986 loan/mortgage agreement entered into between Robert Soltow and Fishells. In 1986, Soltows' neighbor, Richard Fishell, approached Robert Soltow and asked him to become financially involved in a real estate deal. Mr. Soltow declined, but was willing to lend money to Mr. Fishell so long as the loan could be structured for Mr. Soltow's protection and his legal counsel, the Fraser Trebilcock Davis & Foster, P.C. law firm, handled

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[3]United States Court of Appeals, Sixth Circuit, Case No. 93-1182.

the details of the loan arrangements. Fishells wanted the money to purchase the Subject Property. On July 8, 1986, the Fishells and Mr. Soltow entered into a promissory note and a mortgage. Mr. Soltow initially loaned the Fishells $350,000 at 15 percent interest, with semi-annual payments due beginning January 7, 1987 and the entire principal and accrued interest being due July 7, 1989. The obligation was secured by the Subject Property through the mortgage. The Fishells never paid Mr. Soltow back even a penny of the loan as the note required. In early 1988, the Fishells were notified that the loan was in default and that foreclosure proceedings would be commenced if the loan was not paid in full. Richard Fishell has admitted that he understood that Soltow was entitled to his money and entitled to foreclosure on the Subject Property.

Mr. Fishell was interested in working out something in lieu of foreclosure because he wanted to avoid publication of the foreclosure notice in the local newspaper and because he believed that he would be able to sell the Subject Property and avoid further default proceedings. Soltow had also loaned Fishells other amounts during this time period to provide for improvements on the Subject Property or to assist with Fishells' living expenses. On August 25, 1988, Fishells and Mr. Soltow entered into an Amended Promissory Note, a Mortgage Modification Agreement and an Escrow Holding Agreement. The note which Plaintiffs executed on August 25, 1988 was for a principal amount of $610,446.14, representing not only the 1986 loan, but also additional monies which Mr. Soltow had loaned to the Fishells in previous years. The Escrow Holding Agreement provided that Mr. Soltow would not commence foreclosure immediately, but instead would provide the Fishells until February 15, 1989 in which to make full payment. It further required Mr. Soltow to place a mortgage discharge into escrow and conversely, Fishells were required to place an executed warranty deed to the Subject Property in escrow. If Fishells' indebtedness was not paid by February 15, 1989, the escrow agent, Lawyers Title Insurance

Corporation ("Lawyers Title"), was required to, upon notice, release to Mr. Soltow the warranty deed conveying the Subject Property to him. Conversely, if the Fishells paid off the indebtedness, Lawyers Title was to release to the Fishells the mortgage discharge. Mr. Fishell has admitted that he understood the documents he executed on August 25, 1988 in testimony given before the state court and at the 2004 hearing held by the Bankruptcy Court while the Trustee was investigating the merit or lack of merit of the adversary proceeding.

The Fishells never paid anything to Mr. Soltow even though an extension was given. Mr. Soltow then notified the escrow agent pursuant to the terms of the Escrow Holding Agreement, the escrow agent delivered the warranty deed to Mr. Soltow. The warranty deed was recorded on March 16, 1989 in the Eaton County Register of Deeds.

On April 27, 1989, the Fishells, proceeding initially in pro per, filed a complaint in the state court seeking to cancel the warranty deed. They also filed a Notice of Lis Pendens to the Subject Property. The complaint contended that, inter alia when Mr. Fishell signed the 1988 documents, he did not understand the nature of the documents. On June 12, 1989, Soltows filed a counterclaim alleging the Lis Pendens had slandered the title to his property. It was contended by Soltows in their counterclaim that should the litigation continue, and should they prevail, Soltows would pursue their slander of title action against the Debtors.

Chapter 11

The state court proceeding was removed to the United States Bankruptcy Court for the Western District of Michigan. The adversary proceeding was assigned in early 1991 to the Honorable David E. Nims, Jr. The docket from the Bankruptcy Court, which was available to both the District Court and the Sixth Circuit, shows that over the initial 14 months that the Chapter 11 bankruptcy was pending, many motions and related proceedings were brought and considered by Judge Nims who

became extremely familiar with the bankruptcy case, the adversary proceeding and with the credibility of the Fishells.

Bankruptcy Judge Nims became especially familiar with the subject adversary proceeding having denied lengthy cross-motions for summary judgment which had been filed by Fishells and Soltows (reasoning that since appeal was inevitable, it would be prudent to make a full factual record prior to deciding the case, lest he later be reversed for failing to do so). The Court also conducted a lengthy and detailed pretrial of the matter. The trial of the matter was repeatedly scheduled and adjourned, invariably at Fishells' request.

Following conversion of the Chapter 11 proceeding to Chapter 7, the Chapter 7 Trustee, after determining the enormity of the litigation following meetings with the parties, retained the services of attorney Harold Nelson to analyze and evaluate the Debtors' claim against the Soltows. On May 29, 1992, Mr. Nelson conducted a formal 2004 examination of Debtor Richard L. Fishell making substantial inquiry into the merit or lack of merit of Fishells' claim made in the adversary proceeding. After review of the many pleadings and motions filed in the adversary proceeding, the documentation accompanying those pleadings and motions, and after conducting independent research of the legal issues, Mr. Nelson and the Trustee successfully negotiated a settlement with Soltows whereby Soltows would pay the Estate $2,000, and Mr. Soltow would withdraw his Proof of Claim based on the slander of title to the Subject Property in exchange for dismissal of the adversarial proceeding with prejudice. The withdrawal of Soltows' Proof of Claim eliminated the single largest claim against the estate which if allowed, would have had the potential effect of Soltows obtaining a judgment eclipsing the available assets of the estate resulting in the Trustee having nothing to distribute to creditors other than Soltows.

On July 10, 1992, a hearing was held on the Trustee's Motion to Approve Settlement at which time the Honorable

David E. Nims, Jr., after hearing argument of counsel, and offering to take proofs from the objecting Debtors who presented none, approved the settlement, finding the settlement to be in the best interest of the Estate. Thereafter, Debtors' counsel filed a motion for reconsideration. On August 21, 1992, Judge Nims held a hearing and denied the motion for reconsideration via Order dated August 25, 1992. An Order sanctioning the Debtors' attorney for failure to raise any new issues was also issued at that hearing. An appeal, by Debtors, was then taken to the U.S. District Court which on December 7, 1993 affirmed the Bankruptcy Court's Order regarding settlement. A subsequent Order entered by the U.S. District Court on December 9, 1993 also confirmed the bankruptcy judge's decision to sanction Debtors' attorney.

Both the U.S. District Court for the Western District of Michigan and the Sixth Circuit Court of Appeals held, in unpublished opinions, that Debtors lacked standing to appeal and that even if the Debtors did have standing, the Bankruptcy Court did not abuse its discretion in approving the settlement as the Bankruptcy Court had adequately apprised itself of the action's underlying facts and made an independent, informed judgment as to whether the settlement was fair and equitable.

REASONS TO DENY THE WRIT

I. THE DEBTORS LACK STANDING TO APPEAL.

Petitioners argue that there have been two reversible errors by the lower courts. First, Petitioners argue that the Bankruptcy Court failed to make an adequate record of its reasons for approving the settlement thereby suggesting that the Bankruptcy Court lacked the necessary quantum of information necessary to make an informed decision on the merits of the lawsuit, the settlement and the fact that it was in the best interest of the creditors. Petitioners second claim of error is that the lower courts were wrong in concluding that given the

facts of this case, the Debtors lacked standing to appeal the decision of the Bankruptcy Court approving the settlement. Both of Petitioners' claims of error are without merit.

The factors a Bankruptcy Court looks to in determining whether a settlement should or should not be approved are contained in numerous opinions having their roots in the case of Protective Committee Stockholders of TMT Trailer Ferry, Inc v Anderson, 390 U.S. 414, 88 S. Ct. 1157, 20 L. Ed. 2d 1 (1968). In TMT, this Court stated that in reviewing proposed settlements, a Bankruptcy Court should:

> . . . apprise itself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. Further, the judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties in collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Id. at 424.

Most circuits have adopted a set of uniform factors the bankruptcy judge should consider in the process of reviewing proposed settlements. These four factors include:

(a) The probability of success in the litigation;
(b) the difficulties, if any, to be encountered in the matter of collection;
(c) the complexity of the litigation involved and the expense, inconvenience

and delay necessarily attending it;

(d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises.

In re Continental Investment Corp, 637 F2d 8 (1st Cir. 1980); In re Jackson Brewing Co, 624 F2d 605, 607 (5th Cir. 1980); In re Flight Transportation Corp Securities Litigation, 730 F2d 1128 (8th Cir. 1984), cert. denied, 469 U.S. 1207; 105 S. Ct. 1169; 84 L. Ed. 2d 320 (1985); In re A & C Properties, 784 F2d 1377, 1380 (9th Cir. 1986), cert. den. 479 U.S. 854, 107 S.Ct. 189, 93 L. Ed. 2d 122 (1986).

A. The Issue Of Standing Is Reviewed Under The Abuse Of Discretion Standard.

An appellate court reviews questions of law on a de novo basis. In re Revco D.S., Inc, 898 F2d 498, 499 (6th Cir. 1990). However, issues of fact are reviewed based on abuse of discretion In re American Reserve Corp, 841 F2d 159, 162 (7th Cir. 1987). Whether an appellant is a "person aggrieved" is generally considered a question of fact for the trial court. In re El San Juan Hotel, 809 F2d 151, 155 n 3 (1st Cir. 1987).

B. The Debtors Are Not Persons Aggrieved By The Bankruptcy Court Order Approving The Settlement.

The District Court and the Sixth Circuit reviewed the facts of this case and legal arguments presented and held that the Debtors lacked standing to appeal the Settlement Agreement because the Debtors did not show that they were persons

aggrieved by the Bankruptcy Court's Order. These decisions should be allowed to stand as they are correct.

The parties in interest to the adversary proceeding on appeal are John A. Porter, Trustee of the Estate of Richard and Dorothy Fishell, and Robert and Rosalee Soltow, not the Debtors. The Trustee acceded to the Debtors' interest when the case was converted from Chapter 11 to Chapter 7. At that point in time, the Trustee "stepped into the shoes" of the Debtors and assumed the responsibility of determining what was in the best interest of the unsecured creditors and the Estate. The proper parties to the Settlement Agreement were the Bankruptcy Trustee and the Soltows. Bauer v Commerce Union Bank, 859 F2d 438, 441 (6th Cir. 1988), cert. denied, 489 U.S. 1079; 109 S. Ct. 1531; 103 L. Ed. 2d 836 (1989); In re Thompson, 965 F2d 1136, 1141 (1st Cir. 1992).

Other Courts have held that nonparty participation in an adversary proceeding is dependent on intervention. See In re Latimer, 918 F2d 136, 137 (10th Cir. 1990), cert. denied, 502 U.S. 863, 112 S. Ct. 186, 116 L. Ed. 2d 147 (1991) (debtor lacks standing to participate in an adversary proceeding, absent intervention). Mere participation in a hearing on the approval of a settlement or compromise in an adversary proceeding does not constitute *de facto* intervention. Thompson at 1141-1142. A nonparty lacks appellate standing in bankruptcy proceedings unless the nonparty can qualify as a "person aggrieved" by the challenged order. See In re Revco D.S., Inc, 898 F2d 498, 499 (6th Cir. 1990); In re El San Juan Hotel, 809 F2d 151, 154 (1st Cir. 1987). "Persons aggrieved" are "persons with a financial stake in the bankruptcy court's order," Revco at 499; or "those persons whose rights or interests are `directly and adversely affected pecuniarily' by the order or decree . . ." El San Juan Hotel at 154. A Chapter 7 debtor generally is not considered a "person aggrieved," as the debtors lack a pecuniary interest in the "property of the estate." Id. at 154-55; In re MCI, Inc, 151 B.R. 103, 106 (E.D. Mich. 1992).

Petitioners argue that they are directly and adversely affected pecuniarily by the challenged Order based on their "pie in the sky" claimed value of the Subject Property exceeding the liabilities of the Estate.

In bankruptcy proceedings, values are referred to at different points in time for different purposes. In fact, 11 U.S.C. § 506 of the Code and the commentary dealing with valuation recognize that different values may be derived during the course of the proceedings for different purposes, and are not binding on the debtor or creditor for future valuation purposes. The debtor claims that an "independent" appraisal commissioned around 1986 by a prospective purchaser set the value of the Subject Property at over one million dollars. Though not part of the record on appeal, more recent appraisals commissioned by Soltows refute that claim.

It is well recognized that the value of estate property as a going concern in any particular year is significantly greater than its liquidation value. Even if it were to be believed that the valuation Petitioners put on the Subject Property are actually between $500,000 and $1.35 million. That value reflects what the Debtors hoped to get under the best possible conditions in a good real estate market from a willing buyer who had the same vision for development that Petitioners had. Facing a liquidation sale in the 1992 Eaton County, Michigan real estate market, when the adversary proceeding was settled, is an entirely different story. The Courts below and the Trustee recognized these factors. More significantly, even if the Petitioners' estimate of the value of the Subject Property was correct, Petitioners never demonstrated any likelihood of success on the merits of the adversary proceeding. Without establishing a likelihood of success, the alleged value of the Subject Property is irrelevant.

In their attempt to discredit Soltows' slander of title counterclaim, Petitioners have asserted that the claim has no legal validity or is of speculative value. However, others who have reviewed this claim and the facts supporting it disagree.

Both the Bankruptcy Judge and the Trustee thought there was merit to Soltows' claim. As is clearly set forth in Patten Corp v Canadian Lakes Dev Corp, 788 F. Supp. 975, 978 (W.D. Mich. 1991), under Michigan law, an improper filing of notice of lis pendens can be the basis for a slander of title claim.

Other than making bold assertions, completely unsupported by fact, the Petitioners never made any showing that successful litigation in the adversary proceeding would have resulted in any surplus of assets to the Estate which would eventually have been disbursed to the Petitioners. Petitioners never presented a willing buyer who agreed to pay a price so substantial that all creditors would be paid in full and that surplus money would exist that would go to the Petitioners. This is because no such buyer has ever existed. Fishells' claims of there being a "surplus" after all creditors were paid in full is merely unsupported speculation. Without such a showing, the Courts below were correct in holding that the Petitioners lacked standing to pursue an appeal of the settlement of the adversary proceeding. See Thompson, supra at 1144, n.12

II. THE SIXTH CIRCUIT DID NOT ERR WHEN IT HELD THAT THE BANKRUPTCY COURT DID NOT ABUSE ITS DISCRETION BY APPROVING THE SETTLEMENT OF THE ADVERSARY PROCEEDING AND ITS DECISION IS IN HARMONY WITH OTHER CIRCUITS AS WELL AS THIS COURT'S DECISION IN TMT TRAILER.

A. The Sixth Circuit Properly Affirmed The Bankruptcy Court Which Has Broad Discretion To Approve Settlements.

It is well established that a bankruptcy court's decision to approve a settlement is only reviewable for abuse of discretion.

In re Teltronics Services, Inc, 762 F2d 185 (2d Cir. 1985); In re Emerald Oil Co, 807 F2d 1234, 1239 (5th Cir. 1987); In re American Reserve Corp, 841 F2d 159, 162 (7th Cir. 1987); In re A & C Properties, 784 F2d 1377 (9th Cir. 1986), cert. denied, 479 U.S. 854, 107 S. Ct. 189, 93 L. Ed. 2d 122 (1986). Moreover, a bankruptcy court has broad discretion in deciding whether to approve a proposed settlement. In re Ira Haupt & Co. 252 F. Supp. 339 (S.D.N.Y. 1966); In re Sapphire S.S. Lines, Inc, 339 F. Supp. 119 (S.D.N.Y. 1972). The abuse of discretion standard recognizes that because of the bankruptcy judge's unique position to consider equities and reasonableness of a particular compromise, second-guessing by appellate courts will do little to improve upon the bankruptcy judges' decisions. In re American Reserve Corp, 841 F2d at 162.

The Court's authority to approve settlement agreements is set forth in Bankruptcy Rule 9019.

In acting on a motion for settlement, the Bankruptcy Court is afforded wide discretion. In re Sapphire S.S. Lines, Inc, 339 F. Supp. 119 (S.D.N.Y. 1972). In this case, the only objection to the settlement of the adversary proceeding was made by the Petitioners. The Petitioners now appeal the decision of the Sixth Circuit to affirm the settlement based on their contention that insufficient evidence was offered in support thereof. However, the record in this case contains more than sufficient documentation to support the fact that the Bankruptcy Court did not abuse its discretion in issuing the Settlement Approval Order. This is especially true when considering the Bankruptcy Court's special knowledge of the history of this adversary proceeding and the Chapter 11/Chapter 7 case at bar. While the Bankruptcy Court has an affirmative obligation to apprise itself of the underlying facts and make an independent decision as to whether the settlement was fair and equitable, there is no requirement to conduct a mini-trial as the Petitioners seem to contend. Both the District Court and the Sixth Circuit reviewed the record in this case and

determined that the Bankruptcy Court had met its burden of having made an informed decision and affirmed its decision.

B. The Reviewing Appellate Courts Correctly Held That The Bankruptcy Judge Had Access to and Considered The Relevant Factors In The Approval Process.

1. The Sixth Circuits Holding That The Bankruptcy Court Made An Informed Decision That The Settlement Was In The Best Interests Of The Estate Was Not In Conflict With Other Circuits And Was Consistent With This Court's Holding in TMT Trailer.

Contrary to the contention of Petitioners, the decision of the Sixth Circuit not only is not in conflict with other Circuits but is in perfect harmony with the other Circuits and this Court's decision in TMT Trailer, supra. Although Petitioners imply as much in their Brief, no Circuit requires that a bankruptcy court reviewing the propriety of a settlement be required to conduct a mini-trial. Matter of Walsh, 669 F2d 1325 (9th Cir. 1982); In re American Reserve Corporation, 841 F2d 159 (7th Cir. 1987).

> "A bankruptcy judge need not hold a mini-trial or write an extensive opinion every time he approves or disapproves a settlement. The judge need only apprise himself of the relevant facts and law so that he can make an informed and intelligent decision, and set out the reasons for his decision. The judge may make either written or oral findings; form is not important, so long as the findings show the

reviewing court that the judge properly exercised his discretion." Id. at 163.

The Bankruptcy Court in this case fulfilled its affirmative obligation to apprise itself of the actions, facts and the legal theories in order to ascertain that the settlement was fair and equitable. The record made by the parties and the Bankruptcy Court at the July 10, 1992 settlement hearing make it clear that the judge was familiar with the underlying facts, the history of delay on the part of the Debtors, the fact that no creditor objected to the settlement, the additional expense that would be incurred and the legal theories of the parties. The requirement that the Bankruptcy Court make an independent, informed judgment that a proposed settlement is fair and equitable was met and as such, the Sixth Circuit's decision is not in conflict with the decision of any other Circuit nor this Court's decision in TMT Trailer.

The Petitioners cite American Reserve for support of their position that the Bankruptcy Court made an inadequate finding to support approval of the settlement. American Reserve is a factually different case than the case now before the Court. Objections were raised by major creditors and the judge in American Reserve failed to discuss the reasons for his findings. The American Reserve case is distinguishable from the case at bar in that here there are no creditors, major or minor, objecting to the settlement. This is a significant fact since it is one of the four elements that must be considered by the bankruptcy judge in whether to approve a settlement. Furthermore, the bankruptcy judge in the case at bar discussed the reasons for his findings on the record. The District Court in this case, after reviewing the record concluded that "[t]his bankruptcy court gave a sufficient explanation of its findings to show that it examined the various facts and made an informed and independent judgment." [A 37.]

Petitioners contend that there was insufficient facts and evidence presented to the Bankruptcy Court to allow the

Bankruptcy Court to make an informed decision regarding the likelihood that the Estate would prevail on the merits of the adversary proceeding. A review of the record in this case clearly discredits this allegation. As was noted by the Bankruptcy Court during its initial hearing on this matter held on July 10, 1992, "this case has a long history." [A 154.] The bankruptcy judge was well versed in the facts underlying the adversary hearing. [A 154 - 160.] Prior to the July 10, 1992 settlement hearing and subsequent rehearing, the Court had held numerous other hearings regarding the merits of this adversary proceeding, including an extensive hearing on two separate motions for summary judgment. The bankruptcy judge had also presided over a lengthy and detailed pretrial of the adversary proceeding. The bankruptcy judge also presided at a 2004 hearing where Petitioner Fishell was questioned at length by the attorney for the Trustee regarding the details of his adversary proceeding against Soltows.

The facts and legal arguments surrounding the underlying dispute over title to the Subject Property had been presented to the Court on many occasions throughout the Court's nearly two years of overseeing the case while it was in Chapter 11 and Chapter 7. Because of this long history of involvement with the case, the Court was especially well informed to judge the relative merits of the suit. Despite the Petitioners' current contentions to the contrary, this important fact was fully acknowledged and conceded by Petitioners' attorney at the time of the July 10, 1992 hearing on the settlement:

> "The court is well aware of the claims and the factual situations and the legal issues involved in the initial adversary suit by Mr. Fishell against the Soltows." [A 145]

In addition, the record reflects that the Chapter 7 Trustee made an informed decision to settle the Debtors' lawsuit. The Trustee and his attorney spent considerable time evaluating the

merits of the Debtors' claim as well as Soltows' counterclaim. The Chapter 7 Trustee and his counsel, both reviewed the extensive briefs and transcripts from hearings which had been previously submitted to the Court in the lawsuit, analyzed the law on point, and held an extensive 2004 examination of Petitioner Richard Fishell. [A 148 - 150] The Trustee then determined, as evidenced by the proposed settlement, that there was little possibility of ultimately succeeding on the merits. The Trustee further concluded that the potential of any recovery to the Estate was significantly outweighed by the benefits brought by an immediate settlement. The Trustee's "Motion to Approve Settlement" and the attached "Release and Settlement Agreement" provide both a summary of the background of the adversary proceeding and the significant factors on which the proposed settlement was based. The Trustee noted in this documentation that:

> "The Trustee and his counsel have expended substantial resources in investigating and evaluating the merits of both the claims and counterclaims raised in the adversary proceeding. Following such investigation and evaluation, the Trustee has determined that it is in the best interest of the estate and all of the creditors that the adversary proceeding be settled as set forth below. The Trustee bases his decision to enter into the proposed settlement upon factors which include, but are not limited to, the following:
>
> A. Avoiding the risk of litigation which includes the risk that a large damage claim could

potentially be asserted against the estate depending upon the outcome of the adversary proceeding.

B. Avoiding the delay inherent in the litigation process at both the trial and appellate levels.

C. Avoiding the cost to the estate of litigating the adversary proceeding which would involve numerous and complicated legal and factual issues." (Trustee's Motion to Approve Settlement, p 2. [A 165 - 166.])

As noted above, only the Petitioners raised an objection to the settlement. The Estate's many other creditors did not object to the settlement [A 160]. Soltows' counsel and the Petitioners' son and attorney, Roger Fishell, also submitted briefs regarding the proposed settlement. The bankruptcy judge stated that he had read the submitted material that had been presented to him in a timely manner. [A 145] Oral arguments were presented at the hearing and rehearing by attorneys for the Trustee, Soltows and Petitioners. The Petitioners' counsel submitted another memorandum of law the morning of the hearing contending that the settlement was not in the best interests of the Estate. Significantly, although the opportunity to present evidence was available, the Petitioners did not present any testimony at the settlement hearing in

opposition to the proposed settlement. (This would have been the perfect time to present a willing buyer to the Court to show that there would be a "surplus" as is now claimed by the Petitioners.) No testimony or for that matter any other evidence was presented by Petitioners when given the opportunity by the Court.

In their brief, the Petitioners spend considerable time arguing that the Trustee should not have proposed settlement of this adversary proceeding because the slander of title counterclaim set forth by Soltow had no merit. This is simply wrong.

Under Michigan law, a slander of title action exists both pursuant to statute and the common law. MCLA 600.2725 [A 226- 228] provides that if a plaintiff who files the lis pendens does not prosecute the action in good faith, the Court, in its discretion, may direct cancellation of the notice and direct plaintiff to pay any or all costs and expenses occasioned by filing the notice and the cancellation of the record, aside from the cost of the action itself. The common law elements of a cause of action for slander of title are: (1) falsity; (2) malice; and (3) special damages. Once the underlying claim was adjudicated in their favor, Soltow was prepared to offer proof to support his counterclaim under both statutory and common law. Falsity would be established by the ruling favorable to Soltows on the underlying claim of title. Malice would be established by the Fishells' knowingly filing an invalid lien on the property. Special damages would be shown by lost opportunity cost in development and the costs associated with clearing title to the property and the ongoing payment of real estate taxes. The costs incurred after the filing of the bankruptcy petition would have been a post-petition administrative expense given the highest order of priority for payment and would have substantially depleted or completely eliminated any payments to unsecured creditors. Michigan Courts have not addressed the issue of whether a notice of lis pendens is entitled to absolute immunity in certain

circumstances. Patten Corp v Canadian Lakes Dev Corp, 788 F. Supp. 975, 978 (W.D. Mich. 1991). On the other hand, both the Trustee and the Bankruptcy Court Judge who reviewed the claim and supporting information were of the opinion that the counterclaim in this case warranted concern, as it represented the potentially largest claim against the Estate.

The Court in Patten held that "defendant's allegation that it lost sales as a result of the notice of lis pendens sufficiently alleges `special' damages." Patten, supra at 979. Although Petitioners claim that a notice of lis pendens is not an actual lien on the property, the Patten Court noted that a notice of lis pendens is "similar to a lien on real property." Patten, supra at 978, n 4. The Patten Court went on to note:

> It is well settled in Michigan that the filing of a lien is not entitled to absolute immunity from a slander of title action. See Michigan Nat. Bank-Oakland v. Wheeling, 165 Mich App. 738, 745, 419 NW2d 746 (1988). Moreover, the Michigan legislature has evidenced an intent to make such notices actionable by specifically permitting a slander of title action arising out of the wrongful filing of notices under the Marketable Record Title Act. MCLA § 565.104. Id.

Thus, it is apparent from the above that the settlement of the adversary proceeding and the resulting withdrawal of the Soltows' counterclaim (the single largest claim against the estate) gave the estate substantial value and the avoidance of a potentially huge liability.

Moreover, as Soltows and the Trustee pointed out to the Bankruptcy Court, even if it were assumed that the counterclaim for slander of title were not sustainable, settlement of the adversary proceeding was still warranted due

to the complete lack of merit of Petitioners' underlying claim. Throughout the hearings both in the State Court and in the Bankruptcy Court, it became apparent that the underlying claims would eventually be decided on the basis of what witnesses the judge was able to believe. It was also abundantly clear to anyone who had reviewed the record that the Petitioners had lost all credibility with both the State Court Judge and the Bankruptcy Court Judge who oversaw this case. Assuming no further adjournment attempts by Petitioners, Bankruptcy Judge Nims would ultimately have decided the adversary proceeding.

Mr. Fishell's lack of credibility and trustworthiness was soon recognized by the Honorable David E. Nims, Jr. During the hearing and rehearing on the Motion by the United States Trustee for an Order Converting Fishells' Chapter 11 case to a Chapter 7 proceeding, the Bankruptcy Court made specific observations of the Petitioners' lack of credibility and trustworthiness in completing schedules and the unnoticed sale of an asset of the Estate. The Bankruptcy Judge stated that he didn't think he could trust Mr. Fishell anymore to comply with the law. [A 154]

Petitioners also argue that the disparity between the value of the property and the magnitude of the mortgage obligation due Soltows should have been considered by the Court. During the hearing, Debtors' counsel claimed that the value of the property was $1,300,000. However, no evidence of that fact was ever offered. Such a figure was pure speculation given the real estate market in 1992. The fact that Petitioners had been trying to market the parcel for over three years prior to escrowing the deed in lieu of foreclosure following default on the mortgage was undoubtedly a fact not lost on the Court. Indeed, one of the issues the Trustee thoroughly investigated during the 2004 examination presided over by Judge Nims was what the Subject Property was really worth.

The record is clear that the Bankruptcy Court considered fully the complexity of the litigation, expense and delay attendant with continuing with the litigation. [A 158-159]

The Court also considered the paramount interest of the creditors in approving the settlement. A Chapter 7 Trustee is charged with the fiduciary duty to administer the Chapter 7 estate expeditiously and in the best interests of the estate, In re Riverside-Linden Inv Co, 925 F2d 320, 322 (9th Cir. 1991). The policy favoring the efficient bankruptcy administration recognizes that the Chapter 7 trustee is the duly appointed representative of *all* unsecured creditors, rather than the representative of the Chapter 7 debtor or any individual creditor. As such, the trustee is an appropriate arbiter of the "best interests" of the Chapter 7 estate.

In summary, the Bankruptcy Court was well acquainted with the factual background and issues of law relevant to the adversary proceeding, which were extensively briefed and argued on numerous occasions, particularly in conjunction with earlier motions for summary judgment. There was more than sufficient evidence in the record of this case to support the settlement as proposed by the Trustee. The Bankruptcy Judge articulated the basis for his decision on the record which is detailed in the transcripts of the hearing held on July 10, 1992 as well as the hearing held on August 21, 1992. The Bankruptcy Court acted well within the bounds of his discretion when he granted the motion brought by the Chapter 7 Trustee

and issued his Order approving the settlement of the adversary hearing.

2. *The Questions for review are questions of the adequacy of the evidence and consequently do not reach the level of importance appropriate for review by this Court.*

Notwithstanding the Petitioners' arguments to the contrary, a review of the record of this case makes it abundantly clear that the instant case is fact specific. The outcome of whether the settlement of the adversary proceeding would or would not be approved revolved around the particular facts of the bankruptcy, its history and the specific facts of the adversary proceeding. Suffice it to say that the peculiar facts of the adversary proceeding will never again reoccur.

The issue before the court is neither novel nor particularly interesting. The issues are important only to the parties involved. The issues are not important legal problems within the realm of this Court's jurisdiction. This point is clearly evidenced by the fact that neither the District Court nor the Sixth Circuit elected to publish their decisions. The lack of jurisprudence importance is further evidenced by the Sixth Circuit's refusal to grant the Petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc.

It has long been recognized that it is not the role of the United States Supreme Court to review lower court decisions which, as here, turn solely upon an analysis of particular facts involved, or upon the construction of particular contracts or written instruments. United States v Johnston, 268 U.S. 220, 227, 45 S. Ct. 496, 69 L. Ed. 925 (1925). The Court should be even less inclined to review cases like the one at bar where the findings of fact made by the Bankruptcy Court have

received the concurrence of both the District Court and the Court of Appeals.

CONCLUSION

Since there is no direct, real or intolerable conflict among Circuits, and since the Bankruptcy Court's decision, as affirmed by the Sixth Circuit, was based on the peculiar facts of the case and important only to the parties involved, there is no foundation for review. Certainly, the Sixth Circuit Opinion will not produce any anomalous future results since it was based on the peculiar facts of the case and, moreover, was correctly decided on its merits.

Accordingly, the Petition for Certiorari should be denied.

Respectfully submitted,

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(6)

Supreme Court, U.S.
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No 95-30

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1995

Richard L. Fishell and

Dorothy M. Fishell

Petitioners

vs

Robert Soltow and

Rosalee Soltow and

John A. Porter, Trustee

Respondents

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY TO

TO BRIEFS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the bankruptcy court, in considering a contested Rule 9019 motion brought by a Chapter 7 Trustee, complies with the requirements set forth in Protective Committee for Stockholders of TMT Trailer Ferry v Anderson, 390 US 414 (1968) by approving the compromise of an adversary proceeding and a claims objections proceeding when the terms of that compromise produce a $2,000 payment to the estate in return for the estate's relinquishment of an opportunity to recover property valued at $1.38 million and where the court

a. neither requires nor receives testimonial or other evidentiary submissions of any kind;

b. neither allows, disallows or otherwise values the "Proof of claim" being resolved by the compromise;

c. neither discusses nor analyzes

the facts, the merits or the legal issues raised by that "Proof of Claim";

d. neither discusses nor analyzes the facts, the merits or the legal issues raised by the various counts of the complaint in the adversary proceeding being resolved by the compromise; and

e. renders approval of the compromise without setting forth any findings of fact or conclusions of law related to the merits of the "claim" or the causes of action stated in that adversary complaint.

2. Whether the panel decision results in the creation of a conflict between the law of the 6th Circuit and the law of the 7th and 9th Circuits, as well as that set forth by the United States Supreme Court.

3. Whether the panel decision in this case announces a departure from prior precedent concerning evidentiary standards

or burdens placed upon compromise proponents in compromise proceedings in bankruptcy court under Rule 9019 of the Bankruptcy Rules.

4. Whether the panel decision in this case announces a departure from prior precedent concerning the adequacy of the compromise hearing record which must be made before the bankruptcy court so that an appellate court may determine whether the bankruptcy court has rendered "an informed and independent judgment" on the propriety of a compromise which that court approves.

5. Whether the panel decision properly determined that the Debtors lacked standing to appeal an order of the bankruptcy court, rendered pursuant to Rule 9019, entered over the Debtors' objection, where no 6th Circuit authority is cited in support of the panel decision and the panel decision conflicts with the decision of the 1st Circuit, cited

by the panel as authority, and conflicts with 7th circuit authority more directly and factually relevant.

6. Whether Debtors in cases, such as this one, which are not "no-asset" cases may be denied standing to appeal an order, rendered pursuant to Rule 9019, entered over their objection where such order, both, forecloses the Debtors from possible recovery of property through an adversary proceeding and concurrently forecloses consideration of the Debtors objection, filed pursuant to Rule 3007, to a Proof of Claim filed against their bankruptcy estate.

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Argument - Rule 9019

The Respondents themselves have provided further support for the granting of the writ in this case as each brief sheds further light on the deficiencies in the lower court settlement record.

As prescribed by TMT, "clear support in the record coupled with sound analysis" must appear. [1] This is the threshhold which the settlement proponents and the court were required to cross. "Boiler plate" approval does not comply with TMT. [2] Unless the reviewing court can 1) identify pertinent settlement factors from the record and 2) also examine the bankruptcy court's assessment or analysis regarding

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1. See Matter of Jackson Brewing Company, 624 F 2d 605, 608 (5th Cir 1980)(citing TMT).

2. 390 US at 434. The bankruptcy court must provide the reviewing court

> "....some basis for distinguishing between well reasoned conclusions... and mere boiler plate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law."

those factors, review of the bankruptcy court's decision to approve the settlement is impossible. Without such a foundation the reviewing court is left, not with the facts and law which moved the bankruptcy court to act, but with its ultimate conclusions only. Ultimate conclusions, alone, are not sufficient.

The court of appeals opinion reflects these deficiencies. At (A18) the opinion supplies "estimates" about unspecified delay and unquantified litigation expenses which are so broad as to be better described as speculation. The court of appeals was unable to perform its review because the settlement proponents and the court did not furnish the facts or the analysis necessary for that review. The court of appeals could do no more than canvass the range of possible sources of information available to the bankruptcy court, see (A 14-15), rather than focus on the par-

ticulars which would have shown, or failed to show, the legitimacy or the propriety of the overall approval.

The briefs of the Respondents provide further illustrations of the inadequacy, of the approval method. First, there are examples of assertions of "fact" for which there is no citation either to the Appendix or to any other place in the bankruptcy proceedings.[3] Second, in an effort to show

3. In the Trustee's Br. p.1-5, there are references to, e.g. an alleged hardship to Soltow and also to an alleged inability of Fishells to sell the property. The citations given do not support such assertions. The citations are not to "fact" but to speculation engaged in by the court or by the Trustee.

Soltow's Br. p. 1-7, 9-12, 14-23, supplies a far more offensive example of this. In the 24 page Brief only 10 citations are to the Appendix, yet the Appendix contains the complete record of the settlement proceedings. Soltow's Brief is nothing other than a overzealous advocate's unrestrained version of a case which was never tried and covers matters never established by any evidence. It is more akin to an opening argument. It does not inform the reader as to where, in the lower court record, proof of Soltow's version of the case would be found.

the absence of circuit conflict, the Trustee notes that the circuit authorities cite the general Rule 9019 compromise principals which apply, as if merely quoting the principal were the equivalent of a proper application of that principal.

Aside from the highly objectionable practice of setting out factual contentions which have no basis in the record, such practice reveals the inadequacy of the bankruptcy court's consideration of the merits of the controversies it was being asked to settle.[4] Factual assertions of the nature set forth in these briefs for which no record source is noted, might represent the kinds or "categories" of factors which should have been examined by the bankruptcy court.

4. Where the Respondents thought certain of their factual assertions significant enough to include here, those "facts", if true, should be found in the record of the settlement considerations. The fact that they do not displays the handicap imposed on the reviewing courts.

The settlement transcript (A 105) provides no evidence of this. Such evidence as that court considered should have appeared in the bankruptcy court proceedings together with an analysis of its' merits.[5] The moving papers, the presentations of the proponents and the bankruptcy court's ruling are all couched in the most general of terms, all of which skirt the substance of the adversary complaint, as well as the

5. The absence of such a record in the settlement proceedings is further evidence that the bankruptcy court did not fulfill its own "independent" duty to apprise itself fully of the adversary complaint or the Proof of Claim. This is particularly true with respect to the Soltow slander of title Proof of Claim. See (A 42) and (A 105) for what little note is taken of this issue by the court. At the very least, the bankruptcy court left no evidence that it had done so for a reviewing court to examine. The adequacy of TMT compliance is measured by the lower court's actual analysis, not by the magnitude of the court file which may have been available for study. However, this latter standard seems to have sufficed for the court of appeals here. See (A14-15, 18). See Matter of AWECO, 725 F 2d 293, 299 (5th Cir 1984), "the bankruptcy judge should not reach for his stamp marked 'approved' unless some party supplies concrete facts".

Proof of Claim.[6] The missing material is not to be found. (A 42) (A 105)

The second feature which reveals the failure of the lower appellate courts to comply with their duties under TMT is revealed most clearly in the Brief of the Trustee. The Trustee contends that no circuit conflict exists on the compromise standards. In support of this he notes that various circuit opinions have quoted the language of the general rules which are to be applied to Rule 9019 compromises and concludes from this that the quoted

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6. The record should not, at this stage, remain so "un-settled" that Respondents could still argue, speculatively or inaccurately, e.g. that the Soltow loan was for the purchase of the property (Br. p 4) or that the value of the property or the appraisal of $1.38 million from 1989 was subject to debate (Br. p 11-12, 21) or that the concept of a "lien" and a "lis pendens", as well as their legal effect, remained confused or that those concepts were somehow interchangeable, (Br p. 12, 19-20), or that any factor supported any part of the Soltow slander of title theory upon which the Proof of Claim was based (Br p. 11-12, 19-20).

standard has been followed and properly applied by the citing court. However, quoting the proper standard is a far different matter than applying that standard to the issue at hand and therein lies the deficiency in the present case. "General rules" only derive meaning through proper application. Those settlement principals can not be applied in a vacuum. The sixth circuit opinion notes the proper "rule" but finds itself without the "facts" or lower court "analysis" upon which the apply the rule. Without sufficient material in the moving papers, or in the evidence presented in support of the settlement a reviewing court is left with no opportunity to do anything other than speculate about what the bankruptcy judge considered. This is what occurred here. Thus, it is not possible to determine whether the rule of TMT was complied with, and the entire purpose of the rule is defeated.

TMT requires an identifiable basis in the settlement proceedings, not merely the suspicion that such a basis may exist. The Sixth Circuit, however, permitted the latter of these alternatives and, in so doing, has strayed from the requirements of TMT. See (A 14-15, 18)

The sixth circuit rule arising from this case effectively authorizes approval of settlements where assumption is left to rest upon assumption. It was as if the Sixth circuit concluded that with a broad opportunity for examination which a possibly extensive court file would provide, a reviewing court could assume that the bankruptcy court considered all that was relevant therein, and having so assumed, the reviewing court then further assumed that the bankruptcy court adequately or reasonably balanced and resolved all of the issues therein arising.

Such abdication of duty by a reviewing

court renders the TMT rule to be meaningless. With the Circuit Court ruling in this case, TMT has met its demise in the Sixth Circuit. Unless this is corrected, it is possible that other circuits would be pursuaded to adopt its relaxed methodology, and that bankruptcy courts, whose proceedings are already, in many respects, summary in nature, will be encouraged to act even more summarily on issues of this type, to the detriment of all but the most influential or persistent creditor.

The Respondents can not show from the settlement record how the standards set by TMT, or those followed by any circuit cited, were met in this case.[7]

7. Proponents of settlement carried the burden of proof, In Re Hydronic Enterprises Inc., 58 BR 363 (Bankr D RI 1986); In Re A & C Properties, 784 F 2d 1377 (9th Cir 1986), while the bankruptcy court had an independent duty to apprise itself. In Re American Reserve Corporation, 841 F 2d 159 (7th Cir 1987). The record of the proceedings shows that neither achieved what was required.

Argument - Standing

On the issue of standing, Andreuccetti is clearly the relevant authority from the petitioners' standpoint. The bankruptcy court did not conclude that the Petitioners (Debtors) lacked standing to oppose the settlement and did not determine that the Debtors would lack standing to appeal (A 42 and A 105). The District Court concluded that the Petitioners lacked standing to appeal because that court overlooked the contents of the record before it which included any necessary asset and liability information. See (A 241-242)

The Trustee rejects, without analysis, many of the other authorities cited contending that they are irrelevant, as applying to "creditors" only. At issue in each of them, however, is distribution under 11 USC 726(a). So it is with the Debtors as well. See 11 USC 726(a)(6). The Debtors, like any other possible distributees of

the estate, have rights under 11 USC 726(a). The Debtors are in the same class as other creditors, despite their having the lowest priority amongst the members of the class entitled to distribution, or possible distribution, from the estate. If any subclass of creditor has standing to appeal a decision affecting his right to distribution, certainly the Debtors should also be accorded that right. Though they are the last to receive distribution from the estate, they are, because of that order of priority, the first to be affected by any settlement made which affects the assets of the estate from which they would receive distribution. The authorities noted by Petitioners are not irrelevant. Debtors should be accorded standing because 1) the settlement affected their pecuniary interest adversely,[8] 2) they are legitimate

8. Matter of Andreuccetti, 975 F 2d 413, 417 (7th Cir 1992)(possible surplus is sufficient to accord standing to appeal).

claimants to the fund comprising the chapter 7 estate[9] and 3) they filed a valid and timely objection to a claim against that estate, which claim was compromised by the settlement complained of here. (A 85) Claims objection proceedings are "contested matters" under Rule 9014 and a participant in such a proceeding is an "aggrieved party" with standing to appeal.[10] For each and any of these reasons, the Petitioners possessed standing to appeal.

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9. 11 USC 726(a)(6).

10. Rule 3007; Mulligan v Sobiech 131 BR 917 (DC SD NY 1991)(debtor is deemed to be party in interest and Section 502 provides that an objection may be made by any party in interest); 8 L. King, Collier on Bankruptcy, Sec 3007.03(2)(15th Ed. 1990); In Re Chateaugay Corporation, 64 BR 990(DC SD NY 1986)(participant in a contested matter is an aggrieved party with standing to appeal).

Argument - Opposing Briefs

The briefs of the Respondents contain material, or assertions, that were never part of the evidence in the bankruptcy court, neither as a part of the settlement proceedings nor otherwise. This practice, also present in proceedings in the lower courts, has led, (or required), the lower courts to engage in speculation, not only about the propriety of the terms of the settlement involved, but about the settlement procedure itself, as though the record, as "enhanced, magnified or distorted" by the briefs might justify the settlement and the procedure employed, after all.

The only issue is, however, whether or not the bankruptcy court sufficiently performed its task under the guidelines provided by TMT. A major purpose of those standards is to assure that some means of review is made available. A bankruptcy court record of the settlement proceedings

which is so slight as to lend itself to this "after the fact" enhancement can not be said to have conformed to any meaningful standard or guideline at all.

Rule 9019 requires court approval of settlements because those settlements affect far more interests than merely those of the litigants directly involved in the matter being settled. The settlement at issue here is deficient both in terms of what the proponents put into justifying it and in terms of what the court undertook in approving it. A proponent of that settlement, desiring to see it sustained by a reviewing court and finding himself unbounded or uninhibited by the obstacle of a concise and well defined settlement record might find it all too tempting to "supplement" that which was actually before, and considered by, the lower court. So it is here.

Forty minutes of speculation by compro-

mise proponents wherein no particulars of the merits of the matters to be settled are argued, no evidence is presented and no findings of fact are made, (A 109) all but guarantees overstatement and misstatement in briefs and little more than large scale guessing by any appellate court called upon to review the matter.

If the "relaxed" review standard arising from this case, as now approved by the Sixth Circuit, is not disapproved by this Court then no effective means of review will remain for any future settlement under the bankruptcy rules. A direct conflict with TMT, and the several circuits, is now obvious.

Conclusion

If the bankruptcy court decisions under Rule 9019 are to be made, in all practical effect, unreviewable, then such a rule must emanate from this Court. Permitting the Sixth Circuit decision in this case to stand creates uncertainty were none should exist. Only a decision from this Court will assure uniformity in the application of the approval requirements for settlements or compromises under Rule 9019. The Sixth Circuit decision, here, if permitted to stand, virtually assures future disparity in the application of those compromise standards.

TMT must either be reaffirmed, modified or disavowed. Any such decision must come from this Court. Neither uniformity nor certainty will be achieved if the current Sixth Circuit decision stands as it is.

This Court should grant the writ and reverse the decision of the Sixth Circuit

in this case.

Respectfully submitted

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